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IN THE

Supreme Court of the United States

October Term, 1992

STATE OF NEBRASKA,
Plaintiff,

v.

STATE OF WYOMING,
Defendant.

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QUESTIONS PRESENTED

Pursuant to Supreme Court Rules 24.1(a) and 14, the questions presented should include all questions raised, be short and concise, avoid argument and repetition, and be expressed in the terms and circumstances of the case. Rule 24.2 provides that an additional listing of the questions presented need not be provided unless the respondent is dissatisfied with the questions presented by the other side.

Three questions stated either directly or rhetorically by Wyoming, Colorado, and Basin Electric do not reflect the circumstances of this case. These issues properly framed are:

1. Whether the use of the Inland Lakes was apportioned to the State of Nebraska with a priority of December 6, 1904?

2. Whether the State of Wyoming is threatening to deplete the flows of the North Platte River by her administration of the operation of Grayrocks Reservoir and the construction of the Corn Creek Project?

3. Whether subsequent users of apportioned waters diverted at or above Tri-State Dam are among the Nebraska users that the State of Nebraska may protect *parens patriae*?

In addition, each of the questions presented in Nebraska's Exceptions to the First and Second Interim Reports of the Special Master and Brief in Support of Exceptions is implicated in this response to the exceptions filed by Wyoming, Colorado, and Basin Electric.

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STATEMENT OF THE CASE

The Supreme Court Rules require a "concise statement of the case containing all that is material to the consideration of the questions presented, with appropriate references to . . . the record."[1] In this case the record is voluminous, consisting principally of the record of the original proceedings, Special Master Doherty's Report, the Court's opinion in 1945, and the Decree effectuating the apportionment.[2] The record also consists of the affidavits of present-day

[1]S. CT. R. 24.1(g).

[2]The terms "original proceedings," "original litigation," and "*Nebraska v. Wyoming*" as used throughout this brief refer to the record and opinion in *Nebraska v. Wyoming*, 325 U.S. 589 (1945). Record citations are to the original transcript, *i.e.*, Transcript, Record of Proceedings Before the Honorable Michael J. Doherty, Special Master, *Nebraska v. Wyoming*, No. 8, Original ("Record"). The Report of Michael J. Doherty, Special Master is cited as the "Doherty Report." As used throughout this

(cont'd.)

administrators from Nebraska and Wyoming, as well as various United States Bureau of Reclamation personnel associated with the operation and administration of the North Platte River projects pursuant to the Decree, and documents showing how the Decree has been administered since 1945.

Rule 24.2 provides that "no statement of the case need be made beyond what may be deemed necessary to correct any inaccuracy or omission in the statement by the other side."[3] In their briefs on exceptions, neither Colorado nor Basin has provided a statement of the case.[4]

Numerous inaccuracies are present in Wyoming's statement of the case.[5] More importantly, Wyoming omits most of the facts material to the Court's consideration of the questions presented.[6] Accordingly, Nebraska will correct the more egregious inaccuracies and provide a statement of the omitted facts requisite to an understanding of the questions presented to the Court.

A. Inaccuracies in Wyoming's Statement

1. Wyoming states that one of the issues presented in Nebraska's petition is whether the Inland Lakes enjoy a priority date of December 6, 1904, under Wyoming state

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brief, the terms "Decree" and "North Platte Decree" refer to *Nebraska v. Wyoming*, 325 U.S. 665 (1945), *modified*, 345 U.S. 981 (1953).

[3]S. CT. R. 24.2.

[4]*See* Colorado's Exceptions to Special Master's First and Second Interim Reports (July 2, 1992) ("Colorado's Brief on Exceptions"); Exceptions of Basin Electric Power Cooperative to Second Interim Report of Special Master and Brief in Support of Exceptions (July 1, 1992) ("Basin's Brief on Exceptions").

[5]*See* Exceptions of the State of Wyoming to the First and Second Interim Reports of the Special Master and Brief in Support at 3-18 (July 2, 1992) ("Wyoming's Brief on Exceptions").

[6]*See* R. STERN, E. GRESSMAN, S. SHAPIRO, SUPREME COURT PRACTICE § 6.30 (6th ed. 1986).

law.[7] Following discovery, according to Wyoming, "[t]he United States and Nebraska . . . filed motions for summary judgment in which they sought a ruling that the Inland Lakes enjoy a 1904 priority under the Decree. . . ."[8] Next, Wyoming states that "Nebraska's and the United States' focus ha[s] shifted from claims that the Inland Lakes enjoy a water right under state law to claims that the Decree is the basis of the right."[9]

Nebraska has never asserted that the Inland Lakes' priority raises a question of compliance with state law, but has always maintained that the issue is whether the use of the Inland Lakes with a 1904 priority was apportioned to Nebraska.[10] Nebraska's petition in regard to the operation and priority of the Inland Lakes is based solely on Wyoming's threatened violation of "the State of Nebraska's equitable apportionment established in the Decree. . . ."[11]

2. Wyoming states that "[¶ 3(a)] of Nebraska's petition . . . allege[s] that the existing Grayrocks Reservoir . . . violate[s] Nebraska's apportionment under the Decree."[12]

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[7]Wyoming's Brief on Exceptions at 16 (July 2, 1992).

[8]*Id.*

[9]*Id.*

[10]Elsewhere in her brief, Wyoming states that the "only issue raised in the pleadings" is whether Wyoming's actions in regard to the Inland Lakes "violate the Decree." *Id.* at 50 n.20. The Decree effectuates Nebraska's apportionment and is the basis of Nebraska's petition. The state law question was addressed in relation to the United States' intervention in the original proceedings and resolved in favor of Nebraska and the United States. *See infra* p. 63-65.

[11]Nebraska's Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief, Petition for an Order Enforcing Decree and for Injunctive Relief, and Brief in Support of Motion for Leave to File Petition for an Order Enforcing Decree and for Injunctive Relief at 2 (¶ 3(d)) (Oct. 6, 1986) (Docket No. 1) ("Nebraska's Petition").

[12]Wyoming's Brief on Exceptions at 17 (July 2, 1992).

The suggestion is that Nebraska complains that **Basin's** operation of Grayrocks violates the Decree. The petition, however, does not allege that Grayrocks Reservoir as operated by Basin violates the Decree. The petition alleges that **Wyoming's** operation of Grayrocks Reservoir threatens to violate the Decree, *i.e.*, that Wyoming neither can nor intends under state law to administer Grayrocks as Basin is, but threatens to violate the Decree by depleting the flows of the North Platte River through the depletion of Laramie River inflows.[13]

The meaning of ¶ 3(a) was arguably ambiguous in Nebraska's petition. While the petition expressly complained of Wyoming's operation of Grayrocks Reservoir, it did not use the phrase "Wyoming's *administration of* the operation of Grayrocks Reservoir." The intended meaning of ¶ 3(a) was debated by the parties in the briefs on the motion for leave to file, assuring that the intention of ¶ 3(a) was understood by the parties and the Court.[14] Nebraska repeatedly stated that ¶ 3(a) of her petition was meant to address the fact that "Wyoming threatens to violate the North Platte Decree by depleting releases from Grayrocks Reservoir," *i.e.*, by the administration of its principal operational component.[15] After reviewing the positions of the parties with respect to ¶ 3(a) of the petition, the Court granted Nebraska's motion for leave to file her petition.[16]

3. Wyoming states that "[s]ince entry of the Decree in 1945, Nebraska's diversions in the Guernsey to Tri-State Dam section have far exceeded the water requirements

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[13]*See* Nebraska's Petition at 2 (¶ 3(a)) (Oct. 6, 1986) (Docket No. 1).

[14]*See* Wyoming Brief in Opposition to Motion for Leave to File Petition at 6-7 (Nov. 17, 1986) (Docket No. 2).

[15]Nebraska's Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 11 (Jan. 14, 1987) (Docket No. 4); *see also id.* at 1, 4, 11-12.

[16]*Nebraska v. Wyoming*, 479 U.S. 1051 (1987) (Docket No. 4a).

found by Special Master Doherty for those canals."[17] Nebraska canals have not "far exceeded" the water "requirements" determined by Master Doherty. Some Nebraska canals have diverted less than they diverted in 1945 and some canals have diverted more.[18] Cumulatively, the average total canal diversions are within three to five percent of the diversions in 1945 as determined by Master Doherty.[19] Like the Nebraska canals diverting in the Whalen to Tri-State reach, some Wyoming canals have diverted more than their 1945 average and some have diverted less.[20]

4. Wyoming states that she "has never irrigated more than 25,000 acres nor diverted more than 90,000 acre-feet in one year under the Kendrick Project even though Special Master Doherty had determined a water requirement of 168,000 acre-feet per year for 60,000 acres."[21] The Kendrick Project was built in the 1930s. The Project's reservoirs were originally built to store water for the irrigation of 60,000 acres, with an annual net depletion of 72,000 acre feet.[22] Since the Project's initiation 50 years ago, only

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[17]Wyoming's Brief on Exceptions at 8 n.6 (July 2, 1992).

[18][Second] Affidavit of Ann S. Bleed at 28 (¶ 3), 31 (Table 1), Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion (Mar. 1, 1991) (Docket No. 296) ("Second Affidavit of Ann S. Bleed"); [Second] Affidavit of J. Michael Jess at 10-12 (¶¶ 2 & 3), Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion (Mar. 1, 1991) (Docket No. 296) ("Second Affidavit of J. Michael Jess"); [First] Affidavit of Bern S. Hinckley, Figures 1A-1G, Table 1, Wyoming Second Motion for Summary Judgment and Brief in Support (Feb. 22, 1991) (Docket No. 294) ("First Affidavit of Bern S. Hinckley").

[19]Changes in cropping patterns, farming practices, and annual precipitation necessarily result in variable diversions of natural flow.

[20]First Affidavit of Bern S. Hinckley, Figures 2A-2M, Table 2 (Feb. 22, 1991) (Docket No. 294).

[21]Wyoming's Brief on Exceptions at 8 n.6 (July 2, 1992).

[22]Doherty Report at 138.

24,000 acres have been developed.[23] The unused water, however, does not run down the river to Nebraska, as Wyoming implies. Instead, the Kendrick Project retains the water in its reservoirs, resulting in an average annual loss to the river system through reservoir evaporation alone of 60,000 acre feet or 2½ acre feet per irrigated acre. In many years the Project's annual evaporation losses exceed the maximum annual consumption originally contemplated by Master Doherty. In some years evaporation rates exceed the maximum diversions claimed by Wyoming.

B. Facts Material to the Consideration of the Questions Presented

Wyoming has presented questions relating to the history, treatment in the record, and the administration of the Inland Lakes, to the scope and purpose of the proposed Deer Creek Project, to the subsequent use of waters diverted at or above Tri-State Dam, and to the alleged "limitations" on individual Nebraska canals. The facts material to the Court's consideration of these issues are found in the record of the original proceedings, in the affidavits appended to the motions for summary judgment, and in the documents contained in the appendices to the pleadings relating to the cross-motions for summary judgment. The record information material to the apportionment of the Laramie River inflows in ¶ V of the Decree is set forth in Nebraska's statement of the case in her brief in support of her exceptions.[24] The dispute over the meaning of ¶¶ X and XIII(c) is essentially legal in nature.

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[23]First Affidavit of Bern S. Hinckley at 8 (Feb. 22, 1991) (Docket No. 294).

[24]Nebraska's Exceptions to the First and Second Interim Report of the Special Master and Brief in Support of Exceptions (July 1, 1992) ("Nebraska's Brief on Exceptions").

1. Inland Lakes

The history of the Inland Lakes falls into four distinct periods: 1) The pre-litigation period between 1904 and 1934; 2) 1934 to 1945, when *Nebraska v. Wyoming* was litigated and decided; 3) 1945 to 1984, the post-litigation period prior to the formal proposal of the Deer Creek Project; and 4) 1984 to the present. The facts demonstrate that while Wyoming raised objections to the Inland Lakes in the early part of the century, she did not raise those objections during the original litigation. Instead, Wyoming advocated the use of the Inland Lakes to increase her irrigation season apportionment. Thereafter, Wyoming accepted Nebraska's use of the Inland Lakes until she contemplated the development of the proposed Deer Creek Project.

a. Pre-litigation Period: 1904-1934

The North Platte Project was one of the first Bureau of Reclamation irrigation projects constructed under the Reclamation Act of 1902. It supplies water to 226,000 acres of land in Nebraska and Wyoming, and provides a supplemental supply to about 107,000 acres.[25]

There are several components of the North Platte Project. The initial components included: 1) The Pathfinder Reservoir, which has a present capacity of 1,016,507 acre feet with a priority date of December 6, 1904; 2) two main supply canals which divert at the Whalen Diversion Dam near Whalen, Wyoming for use in Nebraska and Wyoming, *i.e.*, the Interstate Canal which diverts on the north side of the North Platte River, and the Fort Laramie Canal which diverts on the south, both having a priority date of December 6, 1904; 3) the Inland Lakes, four off-stream reservoirs located in Nebraska, consisting of Lake Alice, Lake

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[25][First] Affidavit of David G. Wilde at 3 (¶6), Response of the United States to Wyoming's [First] Motion for Summary Judgment (Aug. 22, 1988) (Docket No. 83) ("First Affidavit of David G. Wilde").

Minatare, Little Lake Alice, and Lake Winter's Creek, which collectively have a storage capacity of 75,000 acre feet and are supplied by the Interstate Canal; and 4) the continuation of the non-federal Tri-State Canal which by agreement serves the Northport Irrigation District.[26] *See* Appendix at A-1. The Inland Lakes were designed as an integral part of the Interstate Canal in order to reduce the necessary carrying capacity of the canal.[27] Over 23,500 acres of land depend entirely on the lakes to meet their peak irrigation requirements.[28] Guernsey Reservoir was a component of the North Platte Project which was added later in time. Guernsey has a present capacity of 45,612 acre feet with a priority of April 20, 1923.[29] Glendo Reservoir, which has a capacity of 789,402 acre feet with a priority of August 30, 1951, was part of the Pick-Sloan Program and is operated in conjunction with the North Platte Project.[30]

On December 6, 1904, the Bureau of Reclamation acquired permits in Wyoming and Nebraska to construct the North Platte Project. The Project included Pathfinder Res-

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[26]*See Id.* at 3-4, 6 (¶¶ 7, 8, 15, Exhibit 1); [First] Affidavit of Stanley M. Christensen at 14-15 (¶¶ 3 & 4), Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion (Mar. 1, 1991) (Docket No. 296) ("First Affidavit of Stanley M. Christensen"); *see also* 325 U.S. at 594-95, 602, 649; Doherty Report at 30-31, 34, 86-87, 196, 204, 231-33.

[27]First Affidavit of David G. Wilde at 6-7 (¶ 15) (Aug. 22, 1988) (Docket No. 83). While the Inland Lakes are situated along the Interstate Canal in Nebraska, the canal headgate is located in Wyoming. Wyoming based her pre-litigation complaints about the use of the Inland Lakes on the fact that the Interstate Canal diverts in Wyoming, allegedly without appropriate Wyoming storage permits.

[28]*Id.* at 39 (¶ 74).

[29]*Id.* at 3-4, (¶ 7, Exhibit 1); First Affidavit of Stanley M. Christensen at 14 (¶ 3) (Mar. 1, 1991); *see also* 325 U.S. at 595, 602; Doherty Report at 30, 136.

[30]First Affidavit of David G. Wilde at 6 (¶ 13, Exhibit 1) (Aug. 22, 1988) (Docket No. 83); First Affidavit of Stanley M. Christensen at 14-15 (¶¶ 5 & 8) (Mar. 1, 1991) (Docket No. 296).

ervoir, the Northport Irrigation District, the Ft. Laramie Canal, and the Interstate Canal, which in turn included the Inland Lakes. The lakes were structurally integrated into the Interstate Canal system for the distribution of natural flow to Nebraska lands and were encompassed within these permits.[31] *See* Appendix at A-1. Since 1913, as part of the engineering design and operation of the Interstate Canal, the Inland Lakes have been storing natural flow during the non-irrigation season.[32]

Beginning in 1911 and continuing until 1934, Wyoming asserted that the United States had not complied with Wyoming state law by obtaining individual state storage permits for the Inland Lakes.[33] Wyoming did not, however, seek judicial or administrative recourse to prevent the inte-

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[31]*See* First Affidavit of David G. Wilde at 6-7, (¶¶ 15 & 16) (Aug. 22, 1988) (Docket No. 83); Nebraska North Platte Project Permit No. A-768, Appendices to Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion at A-27-28 (Mar. 1, 1991) (Docket No. 296) ("Nebraska's Appendices"); Application for a Permit to Divert and Appropriate the Water of the State of Wyoming, Permit No. 1398, Enl., Supplemental Appendices to Nebraska's Reply to Wyoming's, Colorado's, the United States' and Basin Electric's Responses to Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion at Appendix No. 2 (May 23, 1991) (Docket No. 353) ("Nebraska's Supplemental Appendices"); General Statement, Nebraska's Supplemental Appendices at Appendix No. 3 (May 23, 1991) (Docket No. 353).

[32]First Affidavit of David G. Wilde at 7 (¶ 19) (Aug. 22, 1988) (Docket No. 83).

[33]*See, e.g.*, Eleventh Biennial Report of the State Engineer to the Governor of Wyoming (1911-1912), Nebraska's Appendices at A-29-36 (Mar. 1, 1991) (Docket No. 296); letter from A. Parshall to A. Weiss (May 2, 1914), Nebraska's Appendices at A-37-39 (Mar. 1, 1991) (Docket No. 296); Minutes of the North Platte River Commission, Second Session (July 17, 1924), Nebraska's Appendices at A-43-49, (Mar. 1, 1991) (Docket No. 296); Report of G. S. Hopkins, Interstate Stream Commissioner to the Governor of Wyoming, Appendix to Wyoming Brief in Response to Motions for Summary Judgment of Nebraska and the United States at C-82-83, (Apr. 26, 1991) (Docket No. 334).

grated use of the Nebraska reservoirs in the Interstate Canal distribution system. Instead, Wyoming issued "certificates of appropriation" encompassing the entire Pathfinder Irrigation District which is served by the Interstate Canal. The certificates state that water had been appropriated and placed to beneficial use in compliance with Wyoming state law.[34]

Twenty years after the North Platte Project was initiated, Guernsey Reservoir was designed and constructed as a component of the project.[35] Shortly thereafter, Guernsey began temporarily storing Inland Lakes water during the non-irrigation season for later transfer to the lakes.[36] The practice of storing non-irrigation season water in Guernsey Reservoir for the Inland Lakes and transferring the water to the Inland Lakes in the spring continued without interruption through the original litigation.

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[34]*See* 325 U.S. at 613; Doherty Report at 173; Nebraska Exhibit No. 572, Nebraska's Appendices at A-74 (Mar. 1, 1991) (Docket No. 296); Miscellaneous Wyoming proofs of appropriation to Nebraska irrigators, Nebraska's Appendices at A-79-90 (Mar. 1, 1991) (Docket No. 296); First Affidavit of David G. Wilde at 8 (¶¶ 20 & 21) (Aug. 22, 1988) (Docket No. 83).

[35]325 U.S. 594-95; Doherty Report at 30; First Affidavit of David G. Wilde at 7, (¶ 18) (Aug. 22, 1988) (Docket No. 83).

[36]*See* First Affidavit of David G. Wilde at 9 (¶ 25) (Aug. 22, 1988) (Docket No. 83); First Affidavit of Stanley M. Christensen at 14-15 (¶¶ 6-7) (Mar. 1, 1991) (Docket No. 296); Third Affidavit of David G. Wilde (p. 23-24 of the Glendo Definite Plan Report — Tables 4 & 5), United States Motion for Partial Summary Judgment on the Inland Lakes (Mar. 1, 1991) (Docket No. 297) ("Third Affidavit of David G. Wilde") (The Inland Lakes water is included within the Guernsey Reservoir category. Columns 45-51 for Lakes Alice and Minatare are included in the overall heading of "Guernsey Reservoir").

b. Litigation Period: 1934-1945

Immediately after the original litigation began, Edwin Burritt, the Wyoming State Engineer, published a summary of the status of the operation of the Interstate Canal system. Burritt repeated Wyoming's position regarding the alleged lack of individual permits for the Inland Lakes, but stated that if the Inland Lakes could be shown to be "an integral part of the original plan filed December 6, 1904," they would have to be accorded a 1904 priority date.[37]

In the original proceedings, Wyoming conceded that the Inland Lakes were functionally integrated into the North Platte Project and the Interstate Canal distribution system and advocated the right of the Inland Lakes to store natural flow during the non-irrigation season.[38] All parties agreed that the Inland Lakes historically accrued natural flow from the North Platte River below Pathfinder as a component of the Interstate Canal.[39] In discussing the historical and continuing integral role of the Inland Lakes in operating the North Platte Project, none of the parties, including Wyoming, took the position that the Inland Lakes could not store natural flow because of an alleged non-compliance with Wyoming law.[40] The only matter affecting the Inland Lakes that the parties did not agree to was the quantity of

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[37]E. Burritt, Water Supply Report, Casper-Alcova Project, Wyo. (Dec. 31, 1934), Nebraska's Appendices at A-62-65 (Mar. 1, 1991) (Docket No. 296).

[38]Answer of the State of Wyoming to Cross-Bill of Colorado at 7 (July, 1936); Brief of State of Wyoming, Defendant at 370, 397 (Sept. 5, 1942).

[39]*See, e.g.*, Record at 480-81, 1182, 14967, 14986-88, 14994-95, 24865, 25209, 26150, 28707, 28783-84; *see also* Nebraska Exhibit Nos. 611, 612, Nebraska's Appendices at A-66-67 (Mar. 1, 1991) (Docket No. 296); United States Exhibit No. 132, Nebraska's Appendices at A-68, (Mar. 1, 1991) (Docket No. 296).

[40]*Cf.* Record at 20417-23, 21345-47, 21475, 26228-30, 27846-47, 28598-99, 29414, 29447-48; *see also* United States Exhibit No. 132, *(cont'd.)*

water that the Interstate Canal should have deducted from its annual irrigation season requirement as a result of the storage of natural flow in the Inland Lakes during the non-irrigation season.[41]

In his report to the Court, Special Master Doherty explicitly found that the Inland Lakes were part of the North Platte Project, *i.e.*, functionally integrated units of the Interstate Canal distribution system.[42] Accordingly, he found that a certain quantity of natural flow could be stored in the Inland Lakes in the non-irrigation season to reduce Nebraska's apportionment of natural flow during the irrigation season.[43] Master Doherty also found that the Pathfinder Reservoir, the Interstate Canal, and the natural flow appropriation for the North Platte Project, had a priority of December 6, 1904.[44]

Wyoming addressed the use and operation of the Inland Lakes and Master Doherty's recommendations regarding their storage right in her brief before the Court on exceptions to Doherty's Report. Wyoming acknowledged that the Inland Lakes were an integral component of the Interstate Canal and the North Platte Project.[45] Wyoming also recognized that the natural flow stored by the Inland Lakes

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Nebraska's Appendices at A-68 (Mar. 1, 1991) (Docket No. 296); Wyoming Exhibit No. 160, Nebraska's Appendices at A-70-71 (Mar 1, 1991) (Docket No. 296).

[41]***See generally*** Record at 26266-67, 26764-65, 26769-70, 26781-82, 27703, 27890-92, 28616, 28697-99, 29038, 29077, 29453-54, 29457-58; ***see also*** Nebraska Exhibit No. 630, Nebraska's Appendices at A-69 (Mar. 1, 1991) (Docket No. 296); Wyoming Exhibit No. 160, Nebraska's Appendices at A-70-71 (Mar. 1, 1991) (Docket No. 296).

[42]Doherty Report at 30.

[43]*Id.* at 60-61, 86-87 n.2 (Table XVII).

[44]*Id.* at 34, 204.

[45]Brief of Defendant, State of Wyoming at 18 (Jan. 29, 1945) (Appendix at A-4).

constituted part of the total water supply to be considered for apportionment.[46] In determining the water requirements of the Interstate Canal with respect to lands in Nebraska, Wyoming advocated the use of the Inland Lakes: "One of the elements which must be considered in determining the May-September requirement of the Pathfinder Irrigation District, under the Interstate canal, is the amount of water which can be diverted to the inland reservoirs serving the Pathfinder District lands, Lakes Alice and Minatare."[47]

Wyoming believed that Master Doherty did not allow a sufficient quantity of storage in the Inland Lakes — 46,000 acre feet — and continued to advocate the storage of larger amounts.[48] Nonetheless, Wyoming expressly accepted Master Doherty's recommendation with respect to the concept of storage in the Inland Lakes.[49] Finally, Wyoming suggested that a decree should be entered apportioning flows in the Whalen/Tri-State reach during the irrigation season "and permitting diversion of 73,000 acre feet to the inland reservoirs of the Pathfinder Irrigation District, Lakes Alice and Minatare, during the winter months, October 1st to April 30th, inclusive."[50]

In its opinion, the Court made several determinations regarding the Inland Lakes. It found that the Inland Lakes were an integral part of the North Platte Project and that the entire North Platte Project had a priority of December 6, 1904.[51] The Court agreed with Special Master Doherty that natural flow diversions into the Inland Lakes

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[46]*Id.* at 20 (Appendix at A-5).

[47]*Id.* at 69 (Appendix at A-8).

[48]*Id.* at 69-70 (Appendix at A-8-9).

[49]*Id.* at 36-37 (Appendix at A-6-7).

[50]*Id.* at 83 (Appendix at A-10).

[51]325 U.S. at 595, 613.

during the non-irrigation season should be deducted from Nebraska's irrigation season natural flow apportionment.[52] The Court limited the equitable apportionment to natural flow, rejecting Wyoming's proposed integration of storage water with natural flow, thereby affirming that the Inland Lakes were an integrated part of the Interstate Canal natural flow distribution system.[53]

c. Post-litigation Period: 1945-1984

Since the Decree was entered in 1945 and continuing until the present, accretions to the North Platte River below Alcova Dam during the months of October, November, and April, have accrued to the Inland Lakes up to a total of 46,000 acre feet annually with a priority of December 6, 1904.[54] This operating procedure was established by representatives from Nebraska, Wyoming, and the United States, based on pages 60-61 of Doherty's Report.[55] Each published

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[52]*Id.* at 646.

[53]*Id.* at 621.

[54]First Affidavit of David G. Wilde at 8-9, 13 (¶¶ 24 & 35) (Aug. 22, 1988) (Docket No. 83); First Affidavit of Stanley M. Christensen at 14 (¶ 6) (Mar. 1, 1991) (Docket No. 296); *see also, e.g.*, letter from J. Ogilvie to E. Lloyd and D. Jones, with attachment: North Platte Storage Ownership Accounting Statement for 1960 (Apr. 22, 1960), Nebraska's Appendices at A-105-110 (Mar. 1, 1991) (Docket No. 296); Letter from F. Murphy to F. Bishop (Mar. 31, 1965), Nebraska's Appendices at A-134 (Mar. 1, 1991) (Docket No. 296).

River gains above Alcova accrue to the Pathfinder ownership account with an equal priority date of December 6, 1904. Because of their physical location in relation to one another, no gains accrue between Pathfinder Reservoir and Alcova Reservoir.

[55]First Affidavit of David G. Wilde at 8-9 (¶ 24) (Aug. 22, 1988) (Docket No. 83); memorandum of D. Jones (Apr. 7, 1960), Nebraska's Appendices at A-128 (Mar. 1, 1991) (Docket No. 296); letter from F. Murphy to F. Bishop (Mar. 31, 1965), Nebraska's Appendices at A-134 (Mar. 1, 1991) (Docket No. 296).

report of North Platte River Ownership and Natural Flow Accounting Procedures, until Wyoming challenged the accounting procedure in 1984, shows that the operations of the Inland Lakes occurred as prescribed by Master Doherty in his Report.[56]

The storage of 46,000 acre feet of natural flow which the Inland Lakes are entitled to accrue has not, as a matter of practical operation, always occurred in the Inland Lakes.[57] Because of icing conditions, it is not practical to physically transfer the Inland Lakes' accrued water through the Interstate Canal to the storage reservoirs in October, November, and April. Historically, 46,000 acre feet has accrued to the Inland Lakes' ownership account, but the water has been physically stored in Guernsey or Glendo. The Inland Lakes' water has then been moved to the Inland Lakes in March, April, or May.[58] The transfer is usually completed by May 15 of each year. The Inland Lakes' ownership account has always been allowed to accrue gains of the natural flow

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[56]*See, e.g.*, First Affidavit of David G. Wilde at 10 (¶ 29, Exhibit 1) (Aug. 22, 1988) (Docket No. 83); North Platte Storage Ownership Accounting Statement (Oct. 1, 1970), Nebraska's Appendices at A-196-99 (Mar. 1, 1991) (Docket No. 296) ("It is assumed that the river gains below Alcova during the months of October, November, and April will accrue to Lakes Alice and Minatare, up to a total of 46,000 acre-feet and at a rate not to exceed 910 second-feet").

[57]During the non-irrigation season, each storage reservoir on the North Platte River is allowed to capture natural flow upstream of its location. Regardless of location, this water is accrued to different project accounts. Thus, one reservoir's ownership is often physically located in another reservoir in order of priority. This "ownership" accounting is the linchpin for the successful administration of the North Platte River system because it conserves the water supply within the system.

[58]First Affidavit of David G. Wilde at 10, 13 (¶¶ 28 & 35) (Aug. 22, 1988) (Docket No. 83); First Affidavit of Stanley M. Christensen at 14-15 (¶ 6) (Mar. 1, 1991) (Docket No. 296).

below Alcova, when available, in first priority up to 46,000 acre feet in October, November, and April.[59]

After the Decree was entered in 1945, the proposed construction of Glendo Reservoir threatened to upset the equitable apportionment determined by the Court. The parties entered into a stipulation agreeing to the construction of Glendo and agreeing that Glendo Reservoir must be operated according to the Glendo Definite Plan Report (Dec. 1952). A primary purpose of the report was to assure that pre-existing rights were protected, including the storage of 46,000 acre feet in the Inland Lakes during the non-irrigation season and the temporary storage of Inland Lakes water in Guernsey or Glendo Reservoirs.[60] Based upon the plan of operation set forth in the Glendo Definite Plan Report, the parties stipulated to the construction of Glendo and to a related amendment of the Decree. After the Decree and the amended Decree were entered, the Inland Lakes continued to utilize Guernsey and Glendo reservoirs for the temporary storage of their natural flow during the non-irrigation season.

d. Deer Creek Period: 1984-Present

During Wyoming's planning for the proposed Deer Creek Project, Wyoming asserted that the historical operation of the Inland Lakes should be changed, with the Inland Lakes being placed last in priority on the river, behind the

[59]First Affidavit of Stanley M. Christensen at 14 (¶ 6) (Mar. 1, 1991) (Docket No. 296); First Affidavit of David G. Wilde at 10, 13 (¶¶ 28 & 35) (Aug. 22, 1988) (Docket No. 83).

[60]First Affidavit of David G. Wilde at 9 (¶ 26) (Aug. 22, 1988) (Docket No. 83); First Affidavit of Stanley M. Christensen at 15 (¶ 8) (Mar. 1, 1991) (Docket No. 296).

proposed Deer Creek Project.[61] Wyoming's engineering studies of the Deer Creek Project established a major benefit to the yield of the project if the Inland Lakes were reassigned a junior priority.[62] In 1984, at the annual river operations meeting, Wyoming insisted that the Inland Lakes be moved to the most junior priority.[63]

On October 3, 1986, seventy-five years after the Inland Lakes' operations began and forty years after the original proceedings were completed, Wyoming filed a suit in Wyoming state court seeking to terminate the historical use of the Inland Lakes on the grounds that the United States had not complied with Wyoming law in 1904 by obtaining Wyoming state permits to store water in the Inland Lakes.[64] Nebraska was not a party to *Christopulos.* Partly in response to *Christopulos,* Nebraska filed her petition to reopen this case on October 6, 1986, to protect her apportionment of the Inland Lakes.

[61]*See, e.g.*, attachment to letter from E. Michael to M. Jess (Jan. 11, 1984), Nebraska's Appendices at A-139-43; memorandum of S. Zvejnieks (undated), Nebraska's Appendices at A-144-46; memorandum of C. Goodwin (Feb. 10, 1984), Nebraska's Appendices at A-147-51; letter from F. A. Bishop to M. K. Purcell (July 23, 1984), Nebraska's Appendices at A-152-58; file not on Discussion of the North Platte Hydrologist's Duties with Regard to Monitoring the Bureau's Accounting and River Operations (July 10, 1985), Nebraska's Appendices at A-159-65; letter and enclosure from J. E. Alverson to J. W. Wade (Jan. 25, 1984), Nebraska's Appendices at A-166-84; Wolfe Memorandum, Nebraska's Appendices at A-23-26 (Mar. 1, 1991) (Docket No. 296).

[62]U.S. Army Corp of Engineers, Final Environmental Impact Statement for Regulatory Permits, Deer Creek Dam and Reservoir, Wyoming at vi-vii (Sept. 1987) ("FEIS").

[63]Minutes of Natural Flow and Ownership Meeting (Apr. 9, 1985), Nebraska's Appendices at A-188-90 (Mar. 1, 1991) (Docket No. 296).

[64]*Wyoming ex rel. Christopulos v. United States*, No. 23-13, Wyo. 8th Dist. Ct. (Oct. 3, 1986), *removed*, No. C86-0370-B, D. Wyo. (Mar. 27, 1987) (*dismissed sua sponte* without prejudice on Aug. 31, 1990) ("*Christopulos*").

2. The Nature and Scope of the Proposed Deer Creek Project

The State of Wyoming, through the Wyoming Water Development Commission, proposes to construct a dam and reservoir on Deer Creek, a tributary entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir. *See* Appendix at A-1. The design and operation of the new project require state and federal permits.[65]

The Deer Creek Project was initially conceived as a multi-purpose project, principally as an industrial water supply project, by Wyoming Water, Inc., a private entity. The first water rights application filed for the project in 1973 sought storage rights for these purposes:

Dead Storage	622 Acre Feet
Irrigation	1,362 Acre Feet
Recreation	1,717 Acre Feet
Municipal	2,000 Acre Feet
Industrial	60,084 Acre Feet
Total Available Capacity	65,785 Acre Feet[66]

In December, 1978, the City of Casper filed its "Application for a Water Supply Project on Deer Creek, Tributary of the North Platte River, for Municipal and Multi-Purpose Water Development." In the application, Casper urged that the State of Wyoming become involved with tributary storage projects and that this particular project "be multi-purpose in nature."[67]

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[65]FEIS at i (Sept. 1987).

[66]Application for Permit to Appropriate Surface Water, State of Wyoming, Temporary Filing No. 21 6/198, Dist. No. 15-5, Water Division No. 1 (Feb. 9, 1973) (Appendix at A-11-12).

[67]Application for a Water Supply Project on Deer Creek, Tributary of the North Platte River, for Municipal and Multi-Purpose Water Development at 2 (Dec. 1978) (Appendix at A-13-18).

The next water rights application for the Deer Creek Project was filed by the State of Wyoming on February 10, 1983, for four purposes:

Municipal	16,700 Acre Feet
Irrigation	7,600 Acre Feet
Recreation & Dead Storage	5,000 Acre Feet
Industrial	36,485 Acre Feet
	65,785 Acre Feet[68]

Municipal use constituted one-fourth of the project.

Finally, aware of interstate ramifications, one of Wyoming's officials advised the project's promoters to "[b]uild Deer Creek for municipal supply."[69] He continued: "[I]f we use it for agricultural purposes, then [Nebraska] may have recourse against us in the courts."[70] Accordingly, Wyoming filed a "Substitute Application" on June 25, 1986.[71] The substitute application stated that the purpose of the proposed project was "municipal, irrigation, industrial, recreation, and fisheries," but it did not designate quantities of water for each specific use. Rather, it stated that the "primary purpose" of the project was municipal use, but "until municipal demands reach their ultimate demands, some of the water could be made available on a temporary basis for other uses such as industrial supplies and supplemental irrigation water."[72]

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[68]Application for a Permit to Appropriate Surface Water, State of Wyoming, Temporary Filing No. 24 6/356, Dist. No. 15-5, Water Division No. 1 (Feb. 10, 1983) (Appendix at A-19-20).

[69]Memorandum of C. Goodwin (Feb. 10, 1984), Nebraska's Appendices at A-148 (Mar. 1, 1991) (Docket No. 296).

[70]*Id.*

[71]Substitute Application for Permit to Appropriate Surface Water, State of Wyoming, Temporary Filing No. 24 6/356, Dist. No. 15-5, Water Division No. 1 (June 25, 1986) (Appendix at A-21-22).

[72]*Id.*

The permit ultimately issued by the State of Wyoming to the Wyoming Water Development Commission for the proposed Deer Creek Reservoir, Permit No. 9248, dated March 13, 1987, is for municipal, recreation, fisheries, industrial, and irrigation purposes.[73] There is no restriction on the scope or number of non-municipal uses or the length of time that such uses might be "temporarily" made.

On January 25, 1985, the Wyoming Water Development Commission applied to the U.S. Corps of Engineers for a dredge and fill permit for Deer Creek Reservoir pursuant to § 404 of the Clean Water Act.[74] Pursuant to the Endangered Species Act ("ESA"), the U.S. Fish and Wildlife Service ("FWS") was required to evaluate the impacts of the proposed Deer Creek Project on threatened and endangered species before a § 404 permit could be issued.[75] Because there are several threatened and endangered species that utilize the habitat of the river below Tri-State Dam, depletions to flows below that point were critical to the success of Wyoming's federal permit applications. If there were unavoidable adverse impacts on threatened or endangered species below Tri-State, the FWS would issue a "jeopardy opinion," and the § 404 permit would not be issued. However, if the depletions were minimal, the FWS would more likely issue a "non-jeopardy opinion," and Wyoming would likely be able to obtain the § 404 permit needed for the proposed project.[76]

The North Platte River Simulation Model ("NPRSM") was the computer program created by Wyoming to obtain a

[73] *Id.* (Appendix at A-23-24).

[74] Clean Water Act, 33 U.S.C. § 1251 (1988).

[75] Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988).

[76] [Fourth] Affidavit of H. Lee Becker at 8-9 (¶¶ 2 & 3) Nebraska's Response to Wyoming's and Colorado's Motions for Summary Judgment and to Basin Electric's Memorandum in Support Thereof (Apr. 25, 1991) (Docket No. 335) ("Fourth Affidavit of H. Lee Becker").

§ 404 permit for the proposed Deer Creek Project.[77] In an attempt to avoid a jeopardy opinion under the ESA, the program was structured to minimize the impacts of the proposed project on flows below Tri-State Dam.[78] The NPRSM used what normally would be simulated output, *i.e.*, flows passing Tri-State Dam, as one of the program's fundamental input parameters. The computer program was designed to hold the reductions in flows passing Tri-State Dam to 1,050 to 1,300 acre feet per year.[79]

In reducing depletions below Tri-State Dam to avoid a jeopardy opinion under the ESA, the NPRSM shows that significant depletions would result upstream in the federal storage reservoirs if the proposed Deer Creek Project were constructed. Under the NPRSM, the resulting depletion of end-of-year carryover storage for the Pathfinder and Kendrick ownerships would be as high as 9,400 acre feet and 77,000 acre feet annually.[80]

In conjunction with the present litigation, Nebraska developed a computer program which simulates the actual reservoir operating rules and administration of the North

[77] *See generally id.* at 8-9 (¶ 2); [First] Affidavit of H. Lee Becker at 21-23 (¶¶ 2-8) Nebraska's Response to Wyoming's Motion for Summary Judgment (Aug. 22, 1988) (Docket No. 81) ("First Affidavit of H. Lee Becker").

[78] Fourth Affidavit of H. Lee Becker at 9 (¶ 2) (Apr. 25, 1991) (Docket No. 335).

[79] *Id.*

[80] First Affidavit of H. Lee Becker at 22 (¶¶ 5 & 6), (Aug. 12, 1988) (Docket No. 81); *see also* First Affidavit of David G. Wilde at 33 (¶ 64), 37 (¶¶ 67 & 68), 38 (¶ 71), 42 (Table 12), 42-51 (¶¶ 79-89) (Aug. 22, 1988) (Docket No. 83).

Platte River.[81] In Nebraska's program, the impacts of the proposed Deer Creek Project on flows below Tri-State were part of the simulated output. Nebraska's program indicates that the depletions caused by the proposed project would be less on the upstream federal storage reservoirs than indicated by the NPRSM — though still significant — but much greater on flows below Tri-State Dam.[82]

Depending on which computer program is used to evaluate the effects of the proposed project, the impacts can be "transferred" either upstream to the federal reservoirs or downstream to flows passing Tri-State Dam, but they cannot be diminished.[83] Through the NPRSM, Wyoming chose to increase the depletions upstream in order to avoid the adverse effects of diminished water supplies below Tri-State Dam on threatened and endangered species.[84] Pursuant to her § 404 permit, Wyoming would be obligated to operate the proposed Deer Creek Project pursuant to the NPRSM, thus impacting storage in upstream reservoirs.[85]

The potential yield of the proposed Deer Creek Project directly relates to the priority of the Inland Lakes. According to the FEIS, if Deer Creek were operated junior to the Inland Lakes, the estimated firm annual yield for the pro-

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[81][Third] Affidavit of H. Lee Becker at 45-47 (¶¶ 9-10), Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion (Mar. 1, 1991) (Docket No. 296) ("Third Affidavit of H. Lee Becker"); Fourth Affidavit of H. Lee Becker at 9 (¶ 3) (Apr. 25, 1991) (Docket No. 335).

[82]Fourth Affidavit of H. Lee Becker at 9 (¶ 3) (Apr. 25, 1991) (Docket No. 335).

[83]*Id.* at 9-10 (¶ 4).

[84]*Id.* at 9 (¶ 2).

[85]Wyoming's state and federal permits for Deer Creek were obtained on the basis of the NPRSM, and Wyoming has stated that Deer Creek will be operated according to the NPRSM.

ject would be 6,400 acre feet.[86] If the project were operated with a priority senior to the Inland Lakes, the firm annual yield would be increased to 9,600 acre feet.[87]

3. Return Flows Below Tri-State Dam

The original proceedings involved the entire North Platte River and the Platte River to Grand Island, Nebraska.[88] Evidence regarding canal uses extended down to Kearney, Nebraska, some 300 miles below Tri-State Dam.[89] After the close of the evidence, Nebraska agreed that it would not demand natural flow from the North Platte River in Wyoming to satisfy irrigation demands east of Bridgeport, Nebraska.[90] *See* Appendix at A-1. Accordingly, Special Master Doherty removed the lands east of Bridgeport from any "direct involvement in the case."[91] There remained a dispute, however, whether the lands between Tri-State Dam and Bridgeport should receive natural flow directly from Wyoming.[92]

In evaluating how to accomplish an equitable apportionment, the parties focused on the section between Whalen, Wyoming, and Bridgeport, Nebraska, where most of the irrigated acreage is located. Extensive evidence was intro-

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[86]FEIS at vi-vii (Sept. 1987).

[87]*Id.*

[88]Doherty Report at 20, 92; *see also* 325 U.S. at 593.

[89]Doherty Report at 96-99.

[90]*Id.* at 92. The commencement of operations at Kingsley Dam in 1941 enhanced the available water supply east of Kingsley, thereby diminishing the need for upstream natural flow during the irrigation season. *Id.* at 92. Largely because of Kingsley Dam, Nebraska was persuaded that the lands east of Bridgeport could safely be removed from consideration of an equitable apportionment of direct natural flow by the Special Master.

[91]*Id.*

[92]*Id.*

duced relating to the total water supply in this reach.[93] *See* Appendix at A-1. The available supply consisted of "original" upstream flows passing Whalen Dam, accretions to the system from tributaries, return flows, and other local sources. Primary sources included North Platte River flows from above Guernsey Reservoir, inflows from the Laramie River and Horse Creek, storage water from Pathfinder Reservoir, and return flows below the state line.[94]

The evidence adduced at trial established a direct relationship between upstream diversions and downstream return flows in the Whalen Dam to Bridgeport reach of the river. Approximately 60 percent of the diversions at or above Tri-State Dam was not consumed, returning to the river as return flows for reuse downstream.[95] Return flows below the state line were dependent on and considered the

[93]The Special Master divided this reach into two sections, Whalen Dam to Tri-State Dam and Tri-State to Bridgeport. In the former reach, referred to as the "pivotal section of the entire river" or the "critical section," he analyzed long-time means of water supplies and means for the drought period of 1931-1940. *Id.* at 53, 146; *see also* 325 U.S. at 604. The long-time means for the Whalen Dam to Tri-State Dam reach advocated by the parties were 1,352,000 acre feet according to Nebraska, 1,321,700 acre feet according to Wyoming, and 1,308,700 according to Colorado. Doherty Report at 64. The Special Master determined, however, that the drought period was most indicative of a dependable supply, concluding that the seasonal average supply between 1931-1940, was 1,058,645 acre feet. *Id.* at 67 (Table III).

In assessing the water supply in the Tri-State Dam to Bridgeport reach, the Special Master relied on Wyoming Exhibit Nos. 177 and 178 to determine that local supplies were adequate to meet the needs of canals in this section. *Id.* at 94-95. Wyoming Exhibit No. 177, Nebraska's Appendices at A-329-31, Wyoming Exhibit No. 178, Nebraska's Appendices at A-332-33 (Mar. 1, 1991) (Docket No. 296).

[94]*See, e.g.*, Record at 1864.

[95]*Id.* at 12890-91. Along the Interstate Canal, for example, one of Nebraska's witnesses estimated that about 65 percent of diversions returned for reuse downstream through various means. Record at 128. The evidence presented by Wyoming differed by ten percent. Wyoming *(cont'd.)*

inevitable result of diversions in the Whalen Dam to Tri-State Dam reach.[96]

Return flows varied directly with the quantity of water diverted upstream.[97] Therefore, changes in diversions in the Whalen/Tri-State reach affected both the available supply and the administration of the river in Nebraska.[98] An increase in upstream headgate deliveries would result in increased return flows.[99] Similarly, reduced upstream diversions resulted in reduced return flows.[100]

Exhibit No. 160-A, Nebraska's Appendices at A-70-71 (Mar. 1, 1991) (Docket No. 296) (55 percent of headgate diversions lost under the Interstate Canal). Of the return flows in the Whalen Dam to Bridgeport reach, the Interstate and Ft. Laramie canals contributed over 60 percent of the total return flows. Record at 26833.

[96]Record at 27811.

[97]*Id.* at 24461-62, 26822; 28712; United States Exhibit No. 271, Nebraska's Appendices at A-263-75 (Mar. 1, 1991) (Docket No. 296).

[98]Record at 26842-45; *see* Wyoming Exhibit No. 148, Nebraska's Appendices at A-334, Wyoming Exhibit No. 149, Nebraska's Appendices at 335-36, Nebraska Exhibit No. 631, Nebraska's Appendices at A-252-53 (Mar. 1, 1991) (Docket No. 296). In their pre-Decree administration of the North Platte River, Nebraska officials first calculated the quantity of all local supplies below the state line, including return flows, and deducted that amount from irrigation demands in the Whalen Dam to the Stateline reach, before requesting direct flow water from Wyoming. Record at 3813-14.

[99]Record at 14788, 26842. With approximately two-thirds of upstream diversions applied to lands between the state line and Bridgeport reentering the stream as return flow, the return flows were described as "replacement water." *Id.* at 175-76. Accordingly, the utilization of return flows reduced the demand on upstream water supplies. As stated by Nebraska's State Engineer: "[T]his practice reduces the demand upriver, substituting drain water for the original water coming from upriver; in other words, there is that much original water up the river that is unencumbered to that extent." *Id.* at 12958.

[100]*Id.* at 26843-45.

The Special Master emphasized the importance of return flows below Tri-State Dam:

> Nor are the benefits of the storage water limited to the land to which it is directly applied. Only a portion of water used for irrigation is thereby consumed. Water remaining after evaporation and transpiration first saturates the subsoil, forming ground storage. When that process is completed and the water tables have risen to the necessary levels, all additional water applied in excess of consumption returns to the stream either in the form of visible surface flows or invisible ground percolation. This return flow water becomes available for rediversion and irrigation use. The development of return flows in Nebraska following the completion and operation of the North Platte Project is graphically shown on Nebraska's Exhibit 411, from which it appears that in the section between its western border and Bridgeport, a distance of sixty miles, the annual visible return flows rose from a negligible quantity in 1911 to approximately 700,000 acre feet in 1927, an increase attributable in the main to the direct and indirect influence of the North Platte Project and the application of project storage water to lands in eastern Wyoming and western Nebraska.[101]

Because Nebraska's equitable interests below Tri-State were being satisfied by return flows, Special Master Doherty able to conclude that Nebraska lands below that point had no equitable claim for direct flow originating in Wyoming or Colorado.[102] Because of the hydrological balance in the Tri-State to Bridgeport section, Special Master Doherty recognized that a sufficient quantity of return flows could be

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[101]Doherty Report at 32-33 (footnote omitted); *see also* 325 U.S. at 596.

[102]Doherty Report at 9; *see also id.* at 92-96.

maintained only if upstream diversions remained the same. This has in fact happened since the Decree was entered.

Special Master Doherty determined that for the Interstate, Fort Laramie, Northport, Gering, Mitchell, and Tri-State canals, the irrigation requirement at the time was 874,750 acre feet per year.[103] The average post-Decree diversions for those canals has actually been 915,809 acre feet per year, a change of less than five percent.[104] The Special Master determined that on the average, 243,933 acres would be irrigated by the same canals.[105] In fact, approximately 250,775 acres have been irrigated by these canals in the average year, a change of three percent.[106] After 1945, the largest diverter, Pathfinder Irrigation District, averaged the same headgate diversion rate as determined by Special Master Doherty, 4.28 acre feet per acre.[107] The consistency of the irrigated acreage and the upstream diversions has been essential to the maintenance of adequate return flows below Tri-State Dam.

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[103]Doherty Report at 59 (Table II), 86-87 (Table XVII).

[104]Second Affidavit of Ann S. Bleed at 28 (¶ 3), 31 (Table 1) (Mar. 1, 1991) (Docket No. 296).

[105]Doherty Report at 59 (Table II), 86-87 (Table XVII).

[106]Second Affidavit of Ann S. Bleed at 28 (¶ 3), 31 (Table 1) (Mar. 1, 1991) (Docket No. 296).

[107]*Id.* Doherty Report at 59 (Table II). The post-Decree records are U.S. Bureau of Reclamation reports. An actual field survey was also done in 1978 by the Nebraska Department of Water Resources and it generally confirms Master Doherty's acreage determinations. According to Special Master Doherty, 245,652 acres were irrigated from the Interstate, Fort Laramie, Northport, Gering, Mitchell, French, and Ramshorn canals in Nebraska. Doherty Report at 59 (Table II), 86-87 (Table XVII). In 1978, the field survey indicated that 241,025 acres were actually irrigated by those same canals, a two percent change. Second Affidavit of J. Michael Jess at 10-12 (¶¶ 2 & 3) (Mar. 1, 1991) (Docket No. 296).

Because of the continuity of upstream diversions since 1945, return flows below the state line have been maintained. From 1949 to 1987, accretions between Tri-State Dam and Bridgeport averaged 736,000 acre feet per year.[108] The May to September irrigation season accretions in this reach which were available for immediate reuse by irrigators averaged 393,600 acre feet annually.[109] While most of the irrigation season accretions below the state line are diverted and utilized by irrigators, only a portion of this water is consumed. There are return flows from the use of return flows. An elaborate system of use and reuse has developed downstream since 1914. Recognizing the significant accretions below the state line due to return flows, Lake McConaughy was designed and began operation in 1941 to capture and once again reuse these waters. Once captured in Lake McConaughy, these waters are utilized for irrigation, hydropower, recreation, and fish and wildlife, including threatened and endangered species.[110]

Finally, Master Doherty considered the water historically passing Tri-State Dam — 81,700 acre feet annually — as a "factor in the balancing of equities between the States."[111] He found that "there undoubtedly will always be, regardless of regulation, substantial quantities of water passing Tri-

[108]Second Affidavit of Ann S. Bleed at 29-30 (¶5), 35 (Table 5) (Mar. 1, 1991) (Docket No. 296).

[109]*Id.*

[110]Under the 1990 Federal Energy Regulatory Commission ("FERC") annual license, one of the two agricultural users of Lake McConaughy water was compelled to release certain minimum instream flows specifically for threatened and endangered species for a portion of that year. The requirement also adversely affected hydropower production.

[111]Doherty Report at 158; *see also id.* at 96; 325 U.S. at 607, 654-55. Master Doherty's determination was based on Wyoming Exhibit No. 180, Nebraska's Appendices at A-337-39 (Mar. 1, 1991) (Docket No. 296).

State Dam usable in the Tri-State-Bridgeport section."[112] Special Master Doherty recognized that this amount of unavoidable operational waste could not be regulated: "[T]here will commonly be accidental water in substantial quantities passing the stateline above that allocated to the State."[113]

Since 1945, water has commonly passed Tri-State Dam due to the natural fluctuations of the river and ordinary management decisions. In May and June, accretions below Guernsey Reservoir commonly exceed irrigation demands and natural flow passes Tri-State Dam. In high flow years such as 1983, as much as 1,253,380 acre feet passed Tri-State Dam as excess flows in the system.[114] In addition, natural flow may be released from canals or it may not be diverted because of unanticipated conditions such as precipitation events. Operational waste or residual water is inadvertent and physically impossible to stop. From 1945 to 1989, the average flow passing Tri-State Dam was 60,460 acre feet, excluding extreme high and low flow years.[115]

4. Canal "Limitations"

As used by Master Doherty, "requirements" are not synonymous with "limitations" on individual canals. When Master Doherty evaluated the Whalen/Tri-State reach, he

[112]Doherty Report at 95. *See also* 325 U.S. at 607, 655.

[113]Doherty Report at 158. The Tri-State Diversion Dam was recently retrofitted, curtailing a significant amount of the seepage of natural flow through the Dam, *i.e.*, a component of the operational waste that Master Doherty took into account in balancing the equities among the states. In 1989, 10 acre feet of natural flow passed Tri-State Dam during the irrigation season. Second Affidavit of Ann S. Bleed at 28 (¶2) (Mar. 1, 1991) (Docket No. 296).

[114]Second Affidavit of Ann S. Bleed at 28 (¶2) (Mar. 1, 1991) (Docket No. 296).

[115]*Id.*

undertook a detailed analysis of each canal's water use.[116] Master Doherty made determinations as to acres actually irrigated and total diversion requirements in acre feet per year and cubic feet per second.[117] These numbers were called "requirements" by Master Doherty, but he explicitly rejected the contention that these determinations would operate as limitations on the canals or on the states in administering their equitable apportionments. Doherty explained that "[t]he findings herein as to requirements cannot, I think, be deemed a limitation upon individual canals or groups, in actual administration, either as to natural flow or storage water, nor do I think any such limitations can properly be imposed by the decree."[118]

Master Doherty also stressed the importance of each state being able to administer her equitable share as she saw fit, without interference from the neighboring state.[119] Based upon these principles, Master Doherty recommended, and the Court accepted, an equitable apportionment of natural flows in the Whalen/Tri-State reach 75% to Nebraska and 25% to Wyoming.[120]

Paragraph IV of the Decree is also implicated by the questions presented. As part of his supply/demand analysis of the middle reaches of the North Platte River, Master Doherty evaluated the effects of the upstream federal stor-

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[116]Doherty Report at 53-92, 196-253.

[117]*Id.* at 59 (Table II), 86-87 (Table XVII), 196-253.

[118]*Id.* at 160-61.

[119]*Id.* at 115; *see also id.* at 149-50.

[120]*Id.* at 179 (¶ 6); 325 U.S. at 667 (¶ V).

age reservoirs on downstream senior appropriators.[121] Special Master Doherty found that both the North Platte Project and Kendrick Project storage reservoirs were junior to many of the downstream canals. If these reservoirs were allowed to store water without observing downstream senior priorities, the river in the lower reach would go dry to the detriment of the senior canals.[122] To address this problem, Master Doherty decided that "[e]quity requires that the Federal Government's North Platte Project and Kendrick Project be operated according to the rule of priority with relation to each other and with relation to all senior appropriations downstream to and including the Nebraska state line canals."[123] The Court adopted Master Doherty's recommendation.[124]

SUMMARY OF ARGUMENT

A. Enforcement/Modification

In their briefs in support of exceptions, Wyoming, Colorado, and Basin have teamed up to generate as much rhetoric as possible to suggest that Nebraska is pursuing a different case than the Court decided to hear. Urging that Nebraska — with Master Olpin's help — is surreptitiously

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[121]Doherty Report at 136-43. Specifically, he evaluated the upstream North Platte Project reservoirs, Pathfinder and Guernsey reservoirs, and the Kendrick Project, which includes Seminoe and Alcova reservoirs, and the natural flow appropriation for the Casper Canal.

[122]*Id.* at 137, 139-41.

[123]*Id.* at 10. *See also* 325 U.S. at 625-32. It was not necessary to require Wyoming to observe the diversions and priorities of the North Platte Project Canals which irrigate lands in Nebraska because these canals have headgates in Wyoming, have Wyoming permits for appropriation, and therefore Wyoming is required to observe their senior priorities according to Wyoming law. Doherty Report at 136-37, 139-40; 325 U.S. at 633.

[124]325 U.S. at 625-32.

attempting to "modify" her apportionment, their argument is twofold.

1. The first part of the enforcement/modification argument in turn has two sub-parts.

Wyoming, Colorado, and Basin argue that Nebraska is seeking a new apportionment or reapportionment downstream of Tri-State Dam by attempting to elude the Court's denial of Nebraska's motion for leave to amend her petition in 1988, by attempting to reapportion the irrigation season flows through her pending motion for leave to apportion the non-irrigation season flows, and by an alleged abuse of her diversions at and above Tri-State for irrigation purposes. They claim that Nebraska is in reality attempting to obtain an apportionment to directly protect environmental interests instead of enforcing the existing irrigation apportionment.

Nebraska and Master Olpin have recognized and fully appreciate that the Court denied Nebraska leave to obtain a reapportionment of irrigation season flows for the protection of critical wildlife habitat and endangered species in 1988, and Nebraska is not pursuing that claim. The pending motion for leave to file an amended petition is unrelated to the previous motion. Aside from being directed to the non-irrigation season flows, it seeks protection of irrigation, hydropower production, industrial, recreation, municipal, and fish and wildlife interests in Nebraska.[125]

The second aspect of the new apportionment argument is that Nebraska is seeking a reapportionment for wildlife purposes through an alleged abuse of her diversions at or

[125]Counts II and III of Nebraska's pending motion seek relief against Wyoming and the United States on the basis of specifically alleged violations of the existing Decree. *See* pending Motion for Leave to File Amended Petition for an Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims at 12-13 (Oct. 9, 1991) (Docket No. 407). Neither count seeks to expand Nebraska's apportionment under the Decree, but rather seeks to preserve it.

above Tri-State Dam for irrigation purposes. In reality, Wyoming is seeking to preclude evidence of injury to second and subsequent users of return flows diverted at or above Tri-State Dam in order to attack the efficiencies of the primary users. The object is to prevent water from being released from storage in Wyoming. *See infra* p. 90-95.

2. In the second part of the enforcement/modification argument, Wyoming, Colorado, and Basin argue that the Decree must be read in isolation to faithfully enforce its terms. The thesis of the argument is that the Decree cannot be enforced if the Court has to resort to the original proceedings to understand or clarify its provisions. In other words, the Decree cannot be viewed as the Court's effort to effectuate the apportionment, but must be viewed as a self-executing, intrinsically complete explication of the original proceedings. They contend that the Decree cannot be enforced unless the element of the apportionment that Nebraska seeks to protect is articulated in a specific injunction or provision of the Decree. Three lines of cases enforcing decrees in original actions, however, stand for the proposition that resort to the record is essential to the enforcement of a decree.

When reduced to specifics — which Wyoming, Colorado, and Basin refuse to do — their enforcement/modification argument is ridiculous. For example, they argue that an evaluation of the effects of proposed tributary storage between Pathfinder and Guernsey cannot be undertaken through the Court's retention of jurisdiction to do so in ¶ XIII(c) without first having in hand the injunction that would result from such an evaluation.

In sum, the enforcement/modification argument is designed to lure the Court into an unconsidered resolution of Nebraska's petition. Wyoming's object, simply, is to exploit a deliberate confusion of the issues instead of setting forth the facts and applying the applicable law.

B. The Inland Lakes

The recent effort by Wyoming to change the Inland Lakes' priority of December 6, 1904, to the most junior on the river is nothing more than an attempt to greatly increase the yield of the proposed Deer Creek Project. Wyoming cannot credibly argue now that the use of the Inland Lakes to irrigate 23,500 acres of land in Nebraska was not apportioned to Nebraska in 1945, especially when Wyoming was the most outspoken proponent of this aspect of the apportionment.

Since their construction in the early 1900s, the Inland Lakes have been administered by Wyoming, Nebraska, and the United States as an integral component of the Interstate Canal with a priority of December 6, 1904. While having raised intermittent complaints about the alleged unpermitted status of the Inland Lakes between 1904 and 1934, Wyoming abandoned the complaints and actively pursued a position confirming the priority of the lakes during the original proceedings. Wyoming not only urged that the use of the Inland Lakes should be apportioned to Nebraska, but argued in 1945 that the quantity of the right should be 65,000 acre feet annually, as opposed to the 46,000 acre feet recommended by Master Doherty and adopted by the Court. The suggestion that Wyoming, Nebraska, and the United States pumped all of their quantitative evidence into an apportioned water right without a priority is absurd. Neither Master Doherty nor the Court was naive enough to apportion a right incapable of enforcement.

Factually, there is no question that the use, requirements, and priority of the Inland Lakes were litigated and determined in the original proceedings as a part of Nebraska's apportionment. Legally, the matter is *res judicata*, supported by considerations of finality and repose. Master Olpin's recommendation of a new Decree provision expressly articulating the apportionment of the use of the Inland Lakes is not a modification of the apportionment, but rather is an affirmation of it.

The issue before Master Olpin was not whether the Inland Lakes were properly permitted as storage reservoirs under Wyoming law, as Wyoming tries to argue. The state law issue, however, was framed in the pleadings in the original proceedings, and the Court held that the United States had complied with Wyoming law in obtaining permits for all of the components of the North Platte Project.

Equitable considerations apply as well. For nearly 80 years, the State of Nebraska — specifically, the Pathfinder Irrigation District — has relied on the Inland Lakes for the storage of natural flow with a priority of December 6, 1904, with Wyoming's cooperation until 1984. Since 1945, Wyoming's acquiescence in the Inland Lakes' operations has also been her post-Decree administrative construction of the apportionment. Neither Nebraska's equitable reliance nor Wyoming's affirmation of the right to the use of the Inland Lakes can be undone in 1992 simply because Wyoming desires to build a new storage reservoir.

Finally, with the post-Decree construction of Glendo Reservoir, Wyoming agreed with Nebraska and the United States in regard to the use of Guernsey and Glendo reservoirs to temporarily store accruals to the Inland Lakes' account for later transfer to the lakes. Based on this plan of operation, as set forth in the Glendo Definite Plan Report, the parties stipulated to the construction of Glendo and a related amendment of the Decree.

C. The Laramie River Inflows

Wyoming argues that the fact that the Laramie Decree was left "undisturbed" should make it clear that not a drop of the Laramie inflows was apportioned to Nebraska. It was Wyoming herself, however, who argued before Master Doherty that the Laramie Decree should be left "undisturbed," while simultaneously asserting that 35,500 acre feet annually from the Laramie could be counted on by Nebraska as part of the irrigation season apportionment fund in the Whalen/Tri-State reach. Wyoming's position in

the original proceedings, including her evidence and the arguments of counsel, should render fanciful this and all other arguments that the Laramie inflows were excluded from Nebraska's apportionment.

Wyoming also argues that the Court's "failure" to enjoin Wyoming from dewatering the Laramie accretions to the Whalen/Tri-State reach should make it clear that the Laramie accretions were not apportioned 75% to Nebraska. The Court, however, did not enjoin the future depletion of any of the accretions in the Whalen/Tri-State reach, *i.e.*, the 89,350 acre feet of accretions to the reach found available for the 75%/25% apportionment. If the Court's express addition in ¶ V of the comparatively minuscule inflows of Spring Creek means anything (2,855 acre feet), 75% of the Laramie River inflows to the Whalen/Tri-State reach must have been apportioned to Nebraska in ¶ V of the Decree. Applying Wyoming's reasoning to ¶ V, the Court would have apportioned none of the Whalen/Tri-State accretions.

Wyoming also argues that her evidence of the continuing, dependable contribution of the Laramie inflows could have been found credible only if the Court adopted her overlying theory of apportionment based on mass allocation. Bearing in mind that the apportionment theories of each of the parties who asserted one — Wyoming, Nebraska, and the United States — were rejected by Master Doherty and the Court, the application of Wyoming's reasoning would render nugatory all of the evidence as found by Master Doherty. Those findings could not have been set aside in 1945 unless they were determined to have been clearly erroneous. Wyoming should not be heard to impeach her own evidence in 1992.

D. The Proposed Deer Creek Project

Wyoming argues that Nebraska has failed to demonstrate threat to her apportionment for uses diverting in the Whalen/Tri-State reach by limiting her discussion of the genuine issues of material fact to the 43 mile reach between

Whalen and Tri-State. Wyoming conveniently omits discussion of the proven injury to Nebraska's storage interests above Whalen which serve diversions in the Whalen/Tri-State reach, as well as the injury to the apportionment of the use of the Inland Lakes located below Tri-State. *See* Appendix at A-1. Wyoming also fails to address the facts showing that the proposed Deer Creek Project is not a municipal project. As she neglected to explain to the Court, the project is planned and permitted as a multi-purpose project for irrigation, industrial, recreational, and municipal uses. As was determined by Master Olpin, the evidence weighs heavily in Nebraska's favor.

Wyoming makes two additional arguments. Despite the specific paragraph of the Decree which provides that the effect of tributary storage should be examined if an imminent threat to the apportionment is raised, *i.e.*, ¶ XIII(c), Wyoming argues that Nebraska may not avail herself of ¶ XIII(c) because the Court must first reach the conclusion that can only be reached after a ¶ XIII(c) evaluation. Pursuing her enforcement/modification theme, Wyoming construes enforcement pursuant to ¶ XIII(c) as an impossibility.

Finally, Wyoming argues that ¶ X creates an absolute "municipal exemption" to the Decree, allowing complete usurpation of the irrigation apportionment without scrutiny of any kind under the Court's retention of jurisdiction. The concept of a "municipal exemption" is premised on the inversion of the subject and object of ¶ X, as well as changing the predicate of the sentence from the negative to the positive. Wyoming's argument, however, goes a step further. It is based on the view that "this decree," in the phrase "[t]his decree shall not affect or restrict" municipal uses, plainly means the whole Decree, including ¶ XIII(c). Applying Wyoming's logic consistently, the Deer Creek Project could not be built because ¶ X would override of ¶ XII(a), which states that the Decree shall not affect priority of appropriation in Wyoming. In this regard, the municipal

part of the Deer Creek Project is designed to obviate priority of appropriation in Wyoming. Wyoming's logic would also preclude an evaluation of the effects of any kind of new or categorically different municipal development in the North Platte River system. Municipal developments could thus consume an unlimited amount of the irrigation apportionment. The answer to Colorado's front-range cities' thirst for water would lie in the headwaters of the Laramie and North Platte rivers, *carte blanche.*

E. The Tri-State Issues

Wyoming argues that because Nebraska cannot demand direct diversions of natural flows originating above Tri-State Dam for uses below the Dam, Wyoming should be able to preclude as a matter of law any evidence which Nebraska might present at trial regarding injury to downstream users. As noted above, Wyoming is arguing that proof of injury to second and subsequent users of waters diverted at or above Tri-State should be precluded. The purpose of Wyoming's argument is to eliminate the legal and equitable obstacle in the way of forcing greater efficiencies on the primary users of waters diverted at Tri-State, which would in turn allow more water to be held in storage in Wyoming.

Nebraska and Wyoming also filed cross-motions for summary judgment on an element of Wyoming's counterclaim, *viz.*, whether the Decree placed absolute ceilings or limitations on diversions for and irrigated acreage under individual Nebraska canals. Master Olpin found a complete absence of evidence to support Wyoming's claim, coupled with the unequivocal explanation by Master Doherty that he was not recommending and could not recommend limitations on individual Nebraska canals.

ARGUMENT

POINT I

NEBRASKA SEEKS CLARIFICATION AND ENFORCEMENT — NOT MODIFICATION — OF THE 1945 APPORTIONMENT

In their briefs in support of their exceptions, Wyoming, Colorado, and Basin have teamed up to generate a smoke screen by arguing that Nebraska is attempting to extend the case beyond the Court's grant of Nebraska's motion for leave to file. *See Nebraska v. Wyoming*, 479 U.S. 1051 (1987) (Docket No. 4a). They argue loudly that Nebraska has transformed the claims in her petition "into different claims" and that Nebraska has redefined " 'enforce' to mean 'modify.' " Basin's Brief on Exceptions at 6 (July 1, 1992); Colorado's Brief on Exceptions at 6 (July 2, 1992). Wyoming urges that the Court may not change "enforce" to "modify" via "clarification" or "construction." *See* Wyoming Reply Brief in Support of Motion for Summary Judgment at 4 (Sept. 19, 1988) (Docket No. 86).

The allegation that Nebraska is seeking to modify the Decree behind the Court's back is designed to avoid the substantive issues presented by the Court's exercise of its original jurisdiction, namely, whether the actions complained of by Nebraska in her petition will upset the equitable apportionment established by the Court in 1945. 479 U.S at 1051. The argument has two parts. First, Wyoming, Basin, and Colorado try to support their modification theory by mixing up unrelated pleadings. In concert, they purposely confuse a motion filed by Nebraska in 1988 to amend her petition concerning irrigation season flows for the protection of critical wildlife habitat — which the Court denied — with an alleged effort to accomplish the same thing in the present proceedings, despite the Court's denial of the motion. They also try to confuse the motion that was denied in 1988 with the pending motion to apportion the

non-irrigation season flows. The Court denied Nebraska's 1988 motion for leave to file her amended petition, and the matter ended there. Nebraska has never pursued an increased apportionment in the context of the 1986 petition and has not attempted an end run around the Court's 1988 decision.

The modification theory is also supported by reference to the so-called "Tri-State" issues. The assertion is that Nebraska is attempting to increase her apportionment by claiming new "rights" for fish and wildlife, particularly threatened and endangered species, independently of the apportionment for the irrigation of lands served by canals diverting at and between Whalen and Tri-State Dam. This is what is loosely described as Nebraska's attempt to obtain a new or increased equitable apportionment during the irrigation season. Wyoming's, Colorado's, and Basin's assertions are patently wrong. Nebraska is not seeking such rights, either directly or indirectly. The fact of the matter is that Wyoming is seeking a new apportionment.

The second part of Wyoming's argument is that the Decree cannot be enforced unless the element of the apportionment that Nebraska seeks to protect is expressly recited in a specific injunction or provision of the Decree. Wyoming asserts that the language of the Decree alone determines what was decided by the Court. Wyoming is asking the Court to ignore the Report of Special Master Doherty, as well as its own opinion and the underlying record, in order to construe the Decree in isolation.[126]

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[126]This argument was the basis of Wyoming's opposition to Nebraska's initial motion for leave to file, as well as Wyoming's first motion for summary judgment. *See, e.g.*, Wyoming Brief in Opposition to Motion for Leave to File Petition at 26 (Dec. 17, 1986) (Docket No. 2); [First] Motion of the State of Wyoming for Summary Judgment and Brief in Support of Motion at 79 (Sept. 11, 1987) (Docket No. 23) ("Wyo- *(cont'd.)*

Articulated in specific terms, this part of Wyoming's enforcement/modification argument has five elements. Wyoming asserts that: 1) Nebraska cannot protect her apportionment of the Inland Lakes with a priority of December 6, 1904, because the Decree does not enjoin the Attorney General of Wyoming from filing a lawsuit to force the United States to obtain a permit; 2) Nebraska cannot enforce her apportionment for the Inland Lakes because no provision of the Decree mentions a priority of December 6, 1904; 3) Nebraska cannot protect her apportionment of 75% of the Laramie River's inflows to the Whalen/Tri-State reach of the North Platte River because ¶ V of the Decree does not say "including the contribution of the Laramie River;" 4) Nebraska cannot protect her apportionment of 75% of the Laramie inflows because the Decree places no injunction or limitation on Wyoming's use of the Laramie and thus there is no provision of the Decree to enforce; and 5) Nebraska cannot exercise the Court's retained jurisdiction to assess the effects of new tributary storage on the existing apportionment because there is no provision of the Decree which prohibits new tributary storage.

A. The "Argument" that Nebraska is Seeking to Enlarge her Apportionment through her Original Petition and Allegedly Excessive Diversions at and above Tri-State Dam is Specious

Wyoming's most egregious misstatement is superficially her most attractive argument:

> The Special Master reached the wrong result . . . because he failed to recognize this lawsuit as one to enforce and protect the existing apportionment, not to enlarge, expand or modify the apportionment.

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ming's First Motion for Summary Judgment"). No law has been cited by Wyoming, Colorado, or Basin for the proposition that comprehending a decree provision by reference to the underlying case is "modification." *See infra* p. 45-49.

> In her answer and in her first summary judgment motion, Wyoming admitted taking the actions alleged in Nebraska's petition but denied as a matter of law that those actions violate the Decree. Nebraska then sought to amend her petition to seek a modification of the Decree. Since Nebraska's motion to amend her petition was denied, Nebraska has tried to characterize her original petition as requesting enlargement of her apportionment.

Wyoming's Brief on Exceptions at 26 (July 2, 1992). Wyoming also states that "the Special Master has accepted Nebraska's changed characterization of her petition as one to modify or enlarge her apportionment and has recommended a trial to equitably apportion water among competing equities in the first instance." *Id.* at 27. Neither assertion is correct.

On January 11, 1988, Nebraska filed a motion seeking to amend her earlier petition "primarily to enforce and modify, if necessary, the Decree to protect instream uses in Nebraska." *See generally* Owen Olpin, Special Master, Second Interim Report on Motions for Summary Judgment and Renewed Motions for Intervention at 7 (Apr. 9, 1992) (Docket No. 463) ("Second Interim Report"). The motion was limited to the irrigation season. It was precipitated by Nebraska's apprehension that the application of post-Decree, federal environmental laws in Nebraska would diminish the irrigation apportionment to Nebraska, without affecting the remainder of the balance of interests found equitable in 1945, *i.e.*, the irrigation apportionments to Colorado and Wyoming.[127] The motion was denied. *See Nebraska v. Wyoming*, 485 U.S. 931 (1988) (Docket No. 59).

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[127]The practical effect of the application of environmental laws to protect the concentration of avian wildlife in Nebraska would be to serve the national interest at the sole expense of the agricultural economy in Nebraska. Since the entry of the Decree in 1945, increased scientific *(cont'd.)*

Wyoming, Colorado, and Basin have attempted to characterize Nebraska's pending Motion for Leave to File Amended Petition for An Apportionment of Non-Irrigation Season Flows and for the Assertion of New Claims as another "in a series of attempts" to reapportion the irrigation season flows. *See, e.g.*, Wyoming's Brief on Exceptions at 9 (July 2, 1992), Colorado's Brief on Exceptions at 4 (July 2, 1992), Basin's Brief on Exceptions at 4 n.3 (July 1, 1992). Nebraska wants to make it clear that the pending motion is unrelated to the motion that the Court denied. The pending motion seeks principally an apportionment of the previously unapportioned, non-irrigation season flows because those flows have been and continue to be relied upon by equitable interests in Nebraska, including irrigation, hydroelectric power production, water-cooled power production, municipalities, recreation, and fish and wildlife, including federally threatened and endangered species. The motion also seeks relief against Wyoming and the United States on the basis of specifically alleged violations of the existing Decree without any proposed modification or expansion of the Decree.

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knowledge and concern have been focused on the ecological effects of water development for irrigation, industrial, municipal, and domestic purposes. *See, e.g.*, Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1544 (1988); National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370 (1988); Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-668 (1988); Fish and Wildlife Conservation Act of 1980, 16 U.S.C. §§ 2901-2912 (1988); Electric Consumers Protection Act of 1986, 16 U.S.C. § 797 (1988). In the North Platte and Platte River valleys, this legislation has been directed, in part, to some 230 species of migratory birds which inhabit the area, six of which are endangered or threatened. While the application of these and other post-Decree federal laws may not be a legal "taking" of a portion of Nebraska's agricultural economy, their application will directly cause an equitable taking, *i.e.*, a diminution of Nebraska's apportionment. *Cf. Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886 (1992). An equitable apportionment for wildlife protection would have adjusted the equities among the three states, instead of forcing the wet water solely out of Nebraska's agricultural economy.

If there are competing irrigation, power production, municipal, industrial, or environmental equities in Wyoming and Colorado which have relied on the non-irrigation season flows, Nebraska presumes that those equities would be considered by the Court. Absent an apportionment of the presently unapportioned flows, however, the upstream states have a license to completely dewater the non-irrigation season flows of the North Platte River. There is no other forum in which Nebraska may seek to protect her equities.

The second aspect of Wyoming's and Colorado's claim that Nebraska is underhandedly attempting to obtain a new apportionment for wildlife purposes is asserted in the form of the allegation that Nebraska is diverting flows at or above Tri-State in excess of the water requirements for the North Platte Project Canals and the Nebraska State Line Canals. In relation to their motions for summary judgment, the issue arises in their exceptions to Master Olpin's refusal to recommend summary judgment denying Nebraska's claims of violations of the Decree "to the extent such claims are based on allegations of injury to uses diverting below Tri-State Dam." Wyoming's Brief on Exceptions at 14 (July 2, 1992). The reality is that Wyoming is seeking a new apportionment.

Wyoming sought summary judgment declaring that "evidence of instream uses and uses supplied by diversions below Tri-State Dam is immaterial to proof of violation of Nebraska's apportionment under the Decree," ostensibly to narrow the issues and simplify trial. Wyoming Second Motion for Summary Judgment and Brief in Support at 5 (Feb. 22, 1991) (Docket No. 294) ("Wyoming's Second Motion for Summary Judgment"). Wyoming has an ulterior motive which has not been explained to the Court, however.

As part of her counterclaim, Wyoming will attempt to prove at trial that the Pathfinder Irrigation District and other districts and private canals in Nebraska are diverting

in excess of beneficial use requirements, beneficial use being the basis, the measure, and the limit of the right to use water. *Cf.* NEB. REV. STAT. §§ 46-229, 46-231 (1988 Reissue); *see also* Wyoming's Brief on Exceptions at 37 (July 2, 1992). This aspect of Wyoming's case will be based on the Court's first decision in *Colorado v. New Mexico*, 459 U.S. 176 (1982), where it was stated that "wasteful or inefficient uses will not be protected." *Ibid.* at 184.

As is explained in detail below, Master Doherty and the Court predicated the apportionment of natural flows at and above Tri-State on the fact that users below Tri-State would continue to satisfy their requirements from return flows intercepted and diverted below Tri-State. Wyoming's ulterior motive in seeking "to simplify trial" lies in her awareness that proof of injury to downstream users would preclude the forced improvements in efficiency she seeks to impose on the Nebraska districts and canals from which the return flows are derived. If Wyoming could do so, she could then claim that the "wasted" water should be retained in storage in Wyoming. In other words, Nebraska is seeking no new apportionment by protecting second and subsequent users of waters diverted at or above Tri-State. It is Wyoming who wishes to obtain a new apportionment at the expense of Nebraska equities which were taken into account in 1945 and who have no alternative but to continue to rely on return flows which are not diverted for direct use at or above Tri-State Dam. *See infra* p. 90-95.

B. Enforcement of a Decree Necessitates Construction and Clarification by a Review of the Record

In her petition, Nebraska seeks to enjoin Wyoming from increasing her depletions of the natural flow of the North Platte River in violation of Nebraska's apportionment under the Decree. Nebraska's Petition at 3-4 (Oct. 6, 1986) (Docket No. 1). Enforcing the Decree to protect Nebraska's apportionment necessarily requires construing the

record of the original proceedings, as well as Special Master Doherty's Report and the Court's opinion.

Wyoming's assertion that the states' respective apportionments are confined solely to an eight page decree, without reference to the 75-page opinion of the Court in 1945, Master Doherty's 273 page report, or the 30,000 pages of testimony and 1,300 exhibits upon which the opinion was reasoned and the Decree entered, is neither reasonable nor supported by the law. That the Court has previously construed or clarified decree provisions without modifying the decisions effectuated by the particular decree is undisputable.[128] *See Oklahoma v. Texas*, 272 U.S. 21 (1926); *see also United Shoe Mach. Co. v. United States*, 258 U.S. 451 (1922); *Vicksburg v. Henson*, 231 U.S. 259 (1913). This process is most evident in a series of cases involving the enforcement of the decrees in three different original actions.

In the post-Laramie Decree cases, the cases in which Wyoming sought to enforce the initial decree in *Wyoming v. Colorado*, 259 U.S. 419 (1922), neither Wyoming, Colorado, nor the Court took the view that a decree provision must describe the underlying apportionment sought to be enforced or that the underlying record could not be examined in order to resolve ambiguities to facilitate enforce-

[128]Master Olpin is fully aware of the applicable law, noting that with respect to the enforcement of the Decree in some areas he "turned to a number of primary sources to determine what the Decree means," including "the Court's 1945 Opinion, the Report of Special Master Doherty and the voluminous Record of the decade of proceedings before [Master Doherty] in the original proceedings." Second Interim Report at 14 (Apr. 9, 1992) (Docket No. 463).

ment. In the 1931 action, the Court construed the 1922 Laramie Decree, stating:

> We are of the opinion that the record, opinion and decree in the prior suit, here reviewed at length, show very plainly that the decree must be taken as determining the relative rights of the two States, including their respective citizens, to divert and use the waters of the Laramie and its tributaries. These rights were put in issue by the pleadings, displayed in the evidence, and considered and resolved in the opinion.

Wyoming v. Colorado, 286 U.S. 494, 506-07 (1932). In rejecting the notion that a broader injunction should have been articulated originally, the Court stated:

> Construing the decree in the light of the record and opinion, to which counsel for both States appeal, we think it was intended to and does define and limit the quantity of water which Colorado and her appropriators may divert from the interstate stream and its tributaries and thus withhold from Wyoming and her appropriators.

Id. at 508.

Indeed, in her initial pleading in the 1940 enforcement action, Wyoming asserted that the Laramie Decree she was seeking to enforce could not be enforced without construing the record:

> Reference is hereby made to the amended original bill and exhibits filed, the answer of the defendant, the testimony taken on both sides, the decree in the cause, and each and every other paper and proceeding in this cause from the institution of the suit to the filing of this petition, and it is prayed that the same may be taken and read as a part thereof at any time and on hearings on this petition.

Wyoming's Motion for Leave to File Petition for Rule to Show Cause and Petition for Rule to Show Cause at 6 (¶ 4),

Wyoming v. Colorado, 309 U.S. 572 (1940). Colorado answered Wyoming's petition by stating that she "consents that the former proceedings in this cause may be considered by this Court in the consideration and determination of the petition now pending herein." Answer and Return of the Defendant, the State of Colorado at 2, *Wyoming v. Colorado*, 309 U.S. 572 (1940). In deciding the case, the Court reviewed the 1922 record of proceedings, as well as the 1936 record of proceedings, and construed the 1936 decision in order to hold that the second paragraph of the Laramie Decree had not been violated.[129]

More recently, the Court decided a series of enforcement actions designed to effectuate a 1947 decree relating to the ownership of submerged lands off the coast of California. *See United States v. California*, 332 U.S. 804 (1947). The original decree was supplemented three times to clarify ambiguities arising after entry of the original decree, as well as to address issues which arose after entry of the decree. In *United States v. California*, 382 U.S. 448 (1966), a supplemental decree added definitions and clarified which lands were under the jurisdiction of the State of California. In *United States v. California*, 432 U.S. 40 (1977), a supplemental decree was entered to identify the boundary between the submerged lands of the United States from those of California "with greater particularity." *Id.* at 40. The question of ownership of a national monument was addressed in *United States v. California*, 436 U.S. 32 (1978). In its last opinion, the Court observed: "This case is part of ongoing litigation stemming from an action brought in this Court more than three decades ago. [citations omitted] In each instance, jurisdiction was reserved to enter further orders necessary

[129]The Laramie Decree which was being construed contained two unnumbered, substantive provisions. The original Decree was entered on June 5, 1922. *Wyoming v. Colorado*, 259 U.S. 419, 496 (1922). The Decree was modified on October 9, 1922. *Wyoming v. Colorado*, 260 U.S. 1 (1922).

to effectuate the decrees." *See United States v. California*, 436 U.S. 32, 33 n.1 (1978).

Similarly, *Wisconsin v. Illinois*, 278 U.S. 367 (1929), a suit to enjoin Illinois from diverting water from Lake Michigan, resulted in a decree that was refined twice to clarify the legal consequences of the facts found. *See Wisconsin v. Illinois*, 352 U.S. 945 (1956); *Wisconsin v. Illinois*, 352 U.S. 983 (1957). The decree was later superseded. *See Wisconsin v. Illinois*, 388 U.S. 426 (1967). The replacement of the original decree with a new decree in 1967 constituted the kind of modification not at issue in this case.

In this case, Nebraska has requested the Court to affirm the apportionment and priority of the Inland Lakes, to construe ¶ V of the Decree as having apportioned 75% of the Laramie inflows to the North Platte River to Nebraska, and to evaluate the effects of a tributary storage project which threatens Nebraska's apportionment. *See generally* Nebraska's Petition (Oct. 6, 1986) (Docket No. 1); Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion (Mar. 1, 1991) (Docket No. 296); Nebraska's Brief on Exceptions (July 1, 1992). As the Court has made clear, it is reasonable to construe a decree and modify its terms if necessary to enforce an apportionment. Wyoming, Colorado, and Basin should not be permitted to avoid the fundamental dispute which the Court has granted Nebraska leave to adjudicate. Special Master Olpin construed the pertinent provisions of the Decree as he should have, never "modifying" the apportionment Nebraska seeks to enforce. *See* Owen Olpin, Special Master, First Interim Report at 4-6 (June 14, 1989) (Docket No. 140) ("First Interim Report"); Second Interim Report at 4-10 (April 9, 1992) (Docket No. 463).

C. The Attempt by Wyoming, Colorado, and Basin Electric to Redefine Enforcement or Clarification is Designed to Evade the Substantive Issues to be Resolved by the Court

Aside from the undisputable law, an examination of the specific issues which Wyoming, Colorado, and Basin would like to avoid illustrates that the enforcement/modification tactic is dissembling.

1. Inland Lakes

Paragraph 3.d of Nebraska's petition alleges that Wyoming is threatening to violate Nebraska's equitable apportionment by:

> Actions by state officials to prevent the United States Bureau of Reclamation's continued diversion of North Platte waters in Wyoming through the Interstate Canal for storage in the Inland Lakes in Nebraska for the benefit of water users in the State of Nebraska.

Nebraska's Petition at 2 (Oct. 6, 1986) (Docket No. 1). The allegation relates to Wyoming's attempt to change the 1904 priority of the Inland Lakes to the most junior priority on the river, which would quietly allow Wyoming to greatly increase the yield of the proposed Deer Creek Project. Master Olpin observed that there is a relationship between the Deer Creek Project and Wyoming's maneuvering regarding the Inland Lakes' priority. Second Interim Report at 29 n.44, 33 n.51 (Apr. 9, 1992) (Docket No. 463).

Wyoming has pursued two positions relating to her enforcement/modification argument with respect to the Inland Lakes. First, Wyoming contended that the sole action alleged in Nebraska's petition was the act of filing a lawsuit to stop Nebraska's use of the Inland Lakes, which could not violate the Decree because there is no express provision in the Decree prohibiting such a lawsuit. Wyoming's First Motion for Summary Judgment at 102 (Sept. 11, 1987) (Docket No. 23); *see also id.* at 80, 100. Wyoming described

the legal issue as "whether the Wyoming lawsuit *itself* violates the Decree," concluding that the "Court should rule as a matter of law that the [*Christopulos* suit] does not violate the Decree. . . ." *Id.* at 102-03 (emphasis added). Wyoming's position was based on the fact that the Decree does not enjoin the Attorney General of Wyoming from filing such lawsuits; therefore, absent a "modification" of the Decree, Nebraska had no cause of action.

Second, Wyoming has argued that because an Inland Lakes' right or priority is not mentioned in ¶¶ III or IV of the Decree, there can be none. Wyoming's Brief on Exceptions at 54-55 (July 2, 1992). When Special Master Olpin determined otherwise based upon the Court's opinion, Doherty's Report, and the original record, recommending that a new paragraph be added to make the matter express in the Decree, Wyoming characterized the process as modification. *Id.* at 16-17, 51. The apportionment which Nebraska seeks to protect was not modified at all, but simply reaffirmed with language eliminating the ambiguities that Wyoming has sought to exploit. Second Interim Report at 32-35 (Apr. 9, 1992) (Docket No. 463).

2. Laramie River Inflows

With respect to the apportionment of the Laramie inflows, Wyoming asserts that Nebraska cannot rely on Master Doherty's Report and the Court's opinion, but must first modify the Decree in two ways before Nebraska can enforce her apportionment. Wyoming argues that ¶ V must state "including the contribution of the Laramie River" and that the Decree must expressly include an injunction prohibiting further depletions of the Laramie by Wyoming.[130]

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[130]Basin makes one specific argument regarding the sufficiency of Nebraska's petition, noting Master Olpin's statement in his Second *(cont'd.)*

Wyoming ignores the fact that there was no need to add the phrase "including the contribution of the Laramie River" to ¶ V because the inflows had already been included in the evidence of the waters available for apportionment in the Whalen/Tri-State reach as found by Master Doherty in his report, which the Court specifically recognized. 325 U.S. at 604 n.9, 605. In other words, the "modification" that Wyoming and Basin insist is needed before Nebraska can enforce ¶ V to protect her apportionment is simply redundant of the evidence found by Master Doherty, the summary of the evidence in Table III of his report, and the Court's opinion adopting his recommendations.

Unable to counter the fact that the Laramie has been accounted as the largest tributary contribution to the

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Interim Report that "[i]n her petition, Nebraska alleges that Wyoming unlawfully is depleting and threatening to deplete the flows of the North Platte River by her intended administration of Grayrocks Reservoir's operation and releases on the Laramie River." Basin's Brief on Exceptions at 17 (July 1, 1992). Basin states that "Nebraska alleges no such thing and the special master is wrong to indulge her undertaking to alter this claim from that the Court granted her leave to file." *Id.* at 17 n.16. Basin further states that the claim set forth in the petition is "that Wyoming is violating [Nebraska's] rights under the decree by '[d]epleting the flows of the North Platte River by the operation of the North Platte River by the operation of Grayrocks [sic] Reservoir on the Laramie River.'" *Id.* at 17.

The gist of Basin's assertion is that Nebraska has complained only of **Basin's** operation of Grayrocks, as opposed to **Wyoming's.** That ¶ 3.a of the petition was intended to address Wyoming's administration of Grayrocks Reservoir, including its most obvious component in the context of this case, *i.e.*, its releases, was thoroughly aired and explained in the briefs on the initial motion for leave to file. *See* Nebraska's Reply to Wyoming's Brief in Opposition to Motion for Leave to File Petition at 1, 4, 11-12 (Jan. 14, 1987) (Docket No. 4). Master Olpin's statement of the claim in the petition is exactly the same as Nebraska's explanation of it in 1986. The Court subsequently granted the motion for leave to file. *See supra* p. 3-4.

Basin's argument that the actual Laramie issue is not the one the parties have all been arguing about, *i.e.*, Wyoming's claim to all of the water of Laramie River, is chimerical.

Whalen/Tri-State apportionment under the operation of the Decree, and unable to counter the fact that Laramie inflows have been accounted as part of the daily 75%/25% apportionment since the Decree was entered in 1945, Wyoming argues that because the Decree contains no injunction preventing her from dewatering the Laramie, she may proceed to do. The assertion is more nonsensical than Wyoming's principal modification argument in regard to the Laramie.

It is true that the Court did not add a specific provision to enjoin Wyoming from further depletions of the Laramie River. It is also true, however, that the Court placed no injunctions on Wyoming's use of water from any of the other tributaries or sources of accretions in the Whalen/Tri-State reach. Applying Wyoming's argument to the entire Whalen/Tri-State reach, none of the accretions in this reach of the river — 89,305 acre feet — was apportioned between Nebraska and Wyoming, except the 2,855 acre feet contribution of Spring Creek which the Court expressly included in ¶ V, and possibly the precipitation that falls during the irrigation season on the streambed of the mainstem North Platte. *See infra* p. 73-74; *see also* Appendix at A-1. The fifteen other sources of accretions in this reach would be subject to complete depletion by Wyoming, along with the Laramie. Wyoming's argument would eliminate not only the Laramie inflows, but 89,305 acre feet from the total apportionment fund of 1,061,500 acre feet. Carried to its logical conclusion, Wyoming's argument would have the Court eliminate 8½% of the total apportionment fund, depriving Nebraska of 67,000 acre feet of anticipated flows.[151] The net result, of course, would be to increase the amount of water available to Wyoming.

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[151]Master Doherty determined from the evidence that 1,058,645 acre feet would be the dependable supply in the Whalen/Tri-State reach. Doherty Report at 67 (Table III). He recommended that it be apportioned 75%/25% on a daily basis based on United States Exhibit

(cont'd)

3. Proposed Deer Creek Project

With respect to Deer Creek, Nebraska alleged in her petition that Wyoming was depleting or threatening to deplete tributary flows between Pathfinder Reservoir and Guernsey Reservoir by the construction of new storage facilities. Nebraska's Petition at 2 (Oct. 6, 1986) (Docket No. 1). Nebraska specifically alleged that the Court retained jurisdiction pursuant to ¶ XIII(c) of the Decree to address the effects of proposed tributary storage on her apportionment.

Wyoming has argued that even if ¶ XIII(c) is applicable and adverse effects are proven, Nebraska cannot enjoin the construction of the project because to do so would require an additional injunction in the Decree — a modification. Wyoming Reply Brief in Support of First Motion for Summary Judgment at 11, 24-25 (Sept. 19, 1988) (Docket No. 86). Wyoming argues that because Nebraska sought only enforcement of the Decree and because no provision of the Decree prohibits additional storage capacity on tributaries entering the North Platte between Pathfinder and Guernsey reservoirs, Nebraska cannot prevail "in this limited enforcement action."

When the Court granted Nebraska's motion for leave to file her petition, it necessarily understood that if it were proven at trial that construction of additional storage capacity had the adverse impacts envisioned in ¶ XIII(c), a provision enjoining such construction would be necessary. In requesting the Court to exercise its retained jurisdiction in her petition, Nebraska sought the "enforcement" of the retention of jurisdiction in ¶ XIII(c). If a new injunctive provision were to result, it would flow from the enforcement of ¶ XIII(c). Wyoming is arguing that trial cannot proceed on the effects of new tributary storage under

No. 204A. *Id.* at 69, 179 (¶ 6). After being apprised of the Spring Creek omission by Wyoming, the Court amended Doherty's proposed decree provision No. 6 (¶ V) to expressly add in 2,855 acre feet, making the total 1,061,500 acre feet. *See generally* 325 U.S. at 648, 667.

¶ XIII(c) without first having in hand the injunctive provision that would result from such a trial. Wyoming's argument is tantamount to saying you can't get there from here.

D. Nebraska Seeks No New Rights Below Tri-State Dam

Wyoming argued at length in her first and second motions for summary judgment that Nebraska is claiming something beyond what was apportioned to her. Colorado's and Basin's arguments mirror Wyoming's. Colorado, for example, complains that Nebraska has asserted "claims for the continuation of flows in excess of [her] decreed apportionment to serve uses that do not divert at or above Tri-State Dam."[132] Colorado's Brief on Exceptions at 1 (July 2, 1992). Wyoming and Colorado argue that Nebraska has "failed to articulate any factual basis for claiming such injury." *Id.* at 3. Both arguments are designed to create the false impression that Nebraska is pursuing a different case than accepted and that her purpose is to obtain a new apportionment for wildlife, particularly threatened and endangered species.

Wyoming, Colorado, and Basin have raised a rather portly red herring. There is no reference to any so-called "Tri-State" issue in Nebraska's petition. Nebraska's allegations generally involve Deer Creek, the Inland Lakes, and the Laramie River dispute. The Tri-State issues were raised

[132]Nebraska has never made such a claim. In Nebraska's motion for summary judgment, she pointed out that she "recognizes that '[l]ands in Nebraska supplied by diversions below the so-called Tri-State Dam have no equitable claim upon direct flow water originating in Wyoming or Colorado.' " Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion at 126-27 (Mar. 1, 1991) (Docket No. 296). Nebraska also stated that she "cannot demand natural flow for the North Platte Project canals or for the State Line Canals with the intention of bypassing diversion points at or above Tri-State Dam so that natural flows can be used downstream." *Id.* at 127 (paraphrasing 325 U.S. at 628; Doherty Report at 9, 96).

and framed by Wyoming's counterclaim. In her first and second motions for summary judgment, Wyoming asserted that Nebraska does not have a right under the Decree to protect equities below Tri-State Dam which rely on return flows as their water supply. Wyoming's First Motion for Summary Judgment at 103, 108 (Sept. 11, 1987) (Docket No. 23); Wyoming's Second Motion for Summary Judgment at 57-85 (Feb. 22, 1991) (Docket No. 294). Nebraska responded that return flows below Tri-State Dam constitute an enforceable part of Nebraska's apportionment. *See, e.g.*, Doherty Report at 59 n.2, 87 n.1 and n.2. Nebraska explained that both Special Master Doherty and the Court regarded return flows as a critical component underlying the apportionment of direct flows of the North Platte River to Nebraska. Nebraska was not seeking an increase in return flows below Tri-State Dam, but recognition that second and subsequent users of water diverted at or above Tri-State Dam are among the group of Nebraska users that the State of Nebraska can protect *parens patriae*. *See supra* p. 23-29; *infra* p. 90-95.

In both instances, Wyoming's motions for summary judgment had nothing to do with Nebraska seeking a new apportionment. The dispute related to Nebraska's enforceable rights under the original apportionment. Master Olpin concluded that Nebraska's evidence of injury should not be constrained, especially when its injury claims were not yet fully articulated. First Interim Report at 35-36 (June 14, 1989) (Docket No. 140); Second Interim Report at 35 (Apr. 9, 1992) (Docket No. 463). Special Master Olpin correctly determined that Wyoming's requests for summary judgment were not tied to the pleadings and merely sought to limit Nebraska's evidence at trial. A ruling of the nature sought by Wyoming would be premature, speculative, and amount to an advisory opinion dictating the evidence that Nebraska could present at trial. Second Interim Report at 19, 92-94 (Apr. 9, 1992) (Docket No. 463). Nebraska is not seeking to "modify" the Decree in this regard or seeking a new apportionment.

Wyoming's, Colorado's, and Basin's apprehensions have no basis in Nebraska's pleadings. The real dispute is whether subsequent users of natural flow diverted at or above Tri-State are among the group of users which Nebraska can protect *parens patriae*. The issue cannot be addressed by a meaningless digression into whether the construction of the Decree constitutes enforcement or modification. It should be resolved by reference to the evidence in the original proceedings and the hydrologic facts which established the right of second and subsequent users of waters diverted at or above Tri-State to rely on the Decree for protection. *See supra* p. 23-29; *infra* p. 90-95.

POINT II

THE RECORD DEMONSTRATES THAT THE USE OF THE INLAND LAKES WAS APPORTIONED TO NEBRASKA WITH A PRIORITY OF DECEMBER 6, 1904

The accrual of natural flow during the months of October, November, and April for storage in the Inland Lakes began in 1913 when the lakes were completed as structural components of the Interstate Canal, the largest canal serving the North Platte Project. The continued use of the Inland Lakes to offset the demand on the accrual of natural flow during the irrigation season was apportioned to Nebraska in *Nebraska v. Wyoming*. Forty-six thousand acre feet have accrued annually to the lakes under the doctrine of prior appropriation, with a priority of December 6, 1904, since 1913.[135]

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[135]The doctrine of prior appropriation has been defined as the exclusive right "to divert from a public water supply a specific quantity of water . . . and to apply such water to a specific beneficial use or uses in preference to all appropriative rights of later priority." 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN

(cont'd.)

While the Inland Lakes' storage right has been administered in this manner by the United States and Nebraska in conjunction with the State of Wyoming since 1913, Wyoming took judicial action in 1986 to terminate the diversion of natural flow to the Inland Lakes on the theory that the United States had not complied with Wyoming law in obtaining a state permit to store a portion of the water diverted into the Interstate Canal. *See supra* p. 17. The purpose of *Christopulos* was to eliminate the use of the Inland Lakes with a priority of 1904 so that other uses in Wyoming, including the proposed Deer Creek Project, would gain seniority over the water which has been historically stored in the Inland Lakes.

In her petition and in her motion for summary judgment, Nebraska sought confirmation of the Court's apportionment of the continued use of Inland Lakes. Wyoming sought a determination that water to serve the Inland Lakes could not be administered with a priority of 1904 because the United States had allegedly not complied with Wyoming law and had not obtained the necessary state permits.

A party moving for summary judgment on issues on which it bears the burden of persuasion at trial is required to demonstrate that "it is entitled to summary judgment" through the use of "credible evidence . . . that would entitle it to a directed verdict if not controverted at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 331 (1986) (Brennan, J. dissenting). *See also Lujan v. National Wildlife Federation*, ___ U.S. ___, 110 S. Ct. 3177 (1990). Here the standard was satisfied on the basis of the record of the original proceedings, the submission of affidavits, and documentary

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WESTERN STATES, 226 (1971). All of the western states subscribe to the appropriation doctrine. First in time, first in right is the basis of the doctrine. The essential element is that senior priorities are entitled to be fully satisfied before any water may be distributed to priorities junior in time. *See, e.g., Joerger v. Pacific Gas & Elec. Co.*, 207 Cal. 8, 276 P. 1017 (1929); 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES, 488, 569 (1971).

evidence. Wyoming has suffered a "complete failure of proof." *Celotex*, 477 U.S. at 323.

A. The Use, Requirement, and Priority of the Inland Lakes were Litigated and Determined by the Court in the Original Proceedings

The principal contention of Nebraska and the United States in their motions for summary judgment was that the Inland Lakes' entitlement was conclusively determined in the original litigation. After an extensive review of the record, Special Master Olpin found that there were no genuine issues of material fact that all necessary elements of the Inland Lakes' water right were litigated and determined in the original proceedings. Specifically, Master Olpin found that it was undisputed that the "use and requirements of the Inland Lakes were litigated by Colorado, Wyoming, Nebraska and the United States during the original proceedings." Second Interim Report at 26 (Apr. 9, 1992) (Docket No. 463). He also found that Master Doherty and the Court affirmed the right of the Inland Lakes to store 46,000 acre feet during the months of October, November, and April, with a priority of December 6, 1904. *Id.* at 28. Master Olpin further determined that Wyoming argued in 1945 that the Inland Lakes should be used to their maximum capacity by Nebraska to store natural flow during the non-irrigation season in order to reduce Nebraska's demand on natural flow during the irrigation season. The record unequivocally supports Master Olpin's findings. *See supra* p. 11-14.

While having raised complaints intermittently from 1904 to 1934 about the alleged unpermitted status of the Inland Lakes, Wyoming reversed her position during the original proceedings. *See supra* p. 7-14. She advocated that the storage of natural flow in the Inland Lakes during the non-irrigation season should be maximized, thereby increasing her irrigation season apportionment. Master Doherty adopted Wyoming's proposal that the Inland Lakes should

be utilized for that purpose. Doherty Report at 60-61. In her brief on exceptions in 1945, Wyoming continued to advocate that Nebraska be given a fixed amount of water during the irrigation season together with the diversion of 73,000 acre feet to the Inland Lakes during the winter months. Brief of Defendant, State of Wyoming at 83 (Jan. 29, 1945) (Appendix at A-10).

The Court found that the Inland Lakes formed an integral part of the North Platte Project and that the entire North Platte Project had a priority of December 6, 1904. 325 U.S. at 595, 613. Additionally, the Court decided that natural flow diversions into the Inland Lakes during the non-irrigation season should be deducted from Nebraska's apportionment of natural flow during the irrigation season.[134] *Id.* at 646. This secured the use of the Inland Lakes as part of Nebraska's apportionment.

Wyoming raises two vacuous arguments to dispute Special Master Olpin's findings. First, Wyoming asserts that the "only Inland Lakes issue that was decided in the original proceeding was that any storage in the Inland Lakes during

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[134]If the Inland Lakes had not been allocated a storage right of 46,000 acre feet of natural flow during the non-irrigation season, the Interstate Canal's allotment would have increased by 46,000 acre feet, thereby increasing Nebraska's irrigation season apportionment. The Interstate Canal irrigation season demands would have been greater, likely resulting in a 80%/20% split of natural flow between Nebraska and Wyoming in the Whalen/Tri-State reach.

Wyoming finds it inconsistent that Master Olpin could determine that the Inland Lakes have an immutable priority and a fixed quantity of storage when Master Doherty left open the possibility of one day increasing the non-irrigation season storage of natural flows in the Inland Lakes. Wyoming's Brief on Exceptions at 56 (July 2, 1992). The possibility that Inland Lakes may someday be allowed to increase their storage of natural flow could not affect their priority date. Master Doherty was merely leaving open the possibility of increasing the Inland Lakes storage and accordingly adjusting downward the Interstate Canal requirements if the Decree were amended in the future to adjust the percentage allocation.

the nonirrigation season was to be counted against the requirement of the Interstate Canal for the purpose of determining Nebraska's irrigation season apportionment of natural flow in the Whalen to Tri-State section." Wyoming's Brief on Exceptions at 56 (July 2, 1992). Second, Wyoming contends that without an explicit designation in the Decree, no priority can be recognized for the Inland Lakes.[135] *Id.* at 54-56.

With respect to Wyoming's first argument, Master Olpin concluded that the assertion of a right to store natural flow in the Inland Lakes necessarily involves a recognition of a priority. Second Interim Report at 33 (Apr. 9, 1992) (Docket No. 463). Wyoming advocated that the Inland Lakes must store natural flow to their maximum capacity in the original proceedings. It is unreasonable to conclude that Nebraska, Wyoming, and the United States advocated the use of the Inland Lakes knowing that their use could not continue into the future and that Special Master Doherty and the Court accorded an empty right, *i.e.*, a right without a priority.[136]

Second, Wyoming argues that the Inland Lakes' priority is not made explicit in ¶¶ III or IV of the Decree. Wyoming

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[135]If Wyoming's argument were applied to all the reservoirs, none of the North Platte Project or Kendrick Project reservoirs would have a right to store natural flow because no priority date is set forth in the Decree for any of them.

[136]Wyoming also contends that it was Nebraska's or the United States' duty to present evidence in the original proceeding regarding the Inland Lakes priority, not her's. Wyoming's Brief on Exceptions at 55-56 (July 2, 1992). Neither Master Doherty nor the Court saw the need to place an affirmative provision in the Decree regarding the Inland Lakes because all of the parties' supported the use of the Lakes as an integral component of the Interstate Canal and the North Platte Project. Further, none of the parties contested the right of the North Platte Project, the Interstate Canal, or the Inland Lakes to store natural flow during the non-irrigation season with a priority of 1904.

overlooks that ¶ IV is limited to storage of natural flows during the irrigation season and that the Inland Lakes store natural flow during the non-irrigation season. Wyoming fails to examine the purpose of ¶ III. Paragraph III sets the order of priority for the storage of natural flow in Pathfinder, Guernsey, Glendo, Seminoe, and Alcova reservoirs. The paragraph was included in the Decree as a response to the United States' proposal that the upstream federal storage reservoirs — specifically, Pathfinder, Seminoe, and Alcova — should be permitted to operate jointly and not in priority.[137] 325 U.S. at 632-33; *see also* Doherty Report at 143-45, 181-185; Appendix at A-1. Omission of the Inland Lakes in this paragraph of the Decree means nothing because the Court was tailoring relief to a proposal of the United States that had nothing to do with the Inland Lakes.

For the same reasons, the Inland Lakes were not included in ¶¶ III or IV of the Decree as amended in 1953. *Cf.* Wyoming's Brief on Exceptions at 55 (July 2, 1992). The Decree was amended to add a new reservoir to the system and to address any adjustments that needed to be made in that regard. *See* 345 U.S. at 981-83. It was not the purpose of the amendment to reconfirm rights that had been recognized by the Court eight years earlier. More importantly, before the parties stipulated to the construction of Glendo Reservoir and an amended Decree, they examined the operation of the new reservoir *vis-a-vis* pre-existing rights on the river as described in the Glendo Definite Plan Report. *See* First Affidavit of David G. Wilde at 9 (¶ 26) (Aug. 22, 1992) (Docket No. 83). Their purpose was to assure that the new reservoir would not interfere with established rights. In the Glendo Definite Plan Report, which was to govern the operation of the reservoir, the Inland Lakes were recognized as a senior, enforceable right,

[137]Master Doherty described the proposal as "[t]he desire of the United States is to pool the water to be stored in the three reservoirs and administer it as a common fund. . . ." Doherty Report at 181.

with a priority of December 6, 1904, to store 46,000 acre feet of natural flow during the months of October, November, and April. Third Affidavit of David G. Wilde (Mar. 4, 1992) (Docket No. 297).

Wyoming has raised no issues of fact, either genuine or material, disputing that the use, requirements, and priority of the Inland Lakes' were not fully litigated and determined in the original proceedings as a part of Nebraska's apportionment. She has suffered a "complete failure of proof," and Master Olpin's recommendation of summary judgment in favor of Nebraska and the United States should be granted. *See Celotex*, 477 U.S. at 323.

B. The Court has Determined that the United States had Complied with Wyoming State Law in Obtaining Permits for the North Platte Project, Including the Inland Lakes

Wyoming contends that she "presented extensive documentary evidence before the Special Master showing that the United States never acquired a water storage right under state law for the Inland Lakes."[138] Wyoming's Brief on Exceptions at 52 (July 2, 1992). Wyoming's argument, however, ignores that the Court decided the question in 1945. The issue is *res judicata*.

In the original proceedings, the United States claimed that the "irrigation works" of the North Platte Project included the Inland Lakes. *See generally* Petition of Intervention of the United States of America (June 15, 1938), Appendix 1 to Nebraska's Post-Hearing Brief on Nebraska's, Wyoming's, Colorado's, and the United States'

[138]Special Master Olpin found that facts relating to a Wyoming state water right were immaterial to whether or not the Inland Lakes enjoy a priority of December 6, 1904, as he should have pursuant to Nebraska's petition. Second Interim Report at 32 (Apr. 9, 1992) (Docket No. 463). Aside from Master Olpin's recommended decision, however, the alleged lack of a state permit was also addressed by the Court.

Motions for Summary Judgment at 3-4 (¶ 6) (July 26, 1991) (Docket No. 375) ("Nebraska's Post-Hearing Brief"). The United States further asserted that it had fully and completely complied with § 8 of the Reclamation Act by adhering to the laws of both Wyoming and Nebraska in obtaining permits for all of the project's components. *Id.* at 4-5 (¶ 7).

In her answer to the United States' petition for intervention, Wyoming admitted that the Inland Lakes were part of the North Platte Project, but denied that the United States had complied with her laws with respect to that part of the North Platte Project which diverted water in Wyoming for use in Nebraska, *viz.*, the Interstate Canal, the Inland Lakes, the Ft. Laramie Canal, and the Tri-State Canal. Answer of Defendant State of Wyoming to Petition of Intervention of the United States of America (July 13, 1938), Appendix 2 to Nebraska's Post Hearing Brief at 6-7 (¶¶ 6 & 7) (July 26, 1991) (Docket No. 375). Accordingly, the issue of compliance with Wyoming state law in relation to all components of the North Platte Project was framed by the pleadings in the original proceedings with respect to the use of North Platte River waters in both states.

The Court addressed whether the United States had complied with state laws in initiating and constructing the North Platte and Kendrick projects. 325 U.S. at 611-16. The Court determined that "the water rights on which the North Platte Project and the Kendrick Project rest *have been obtained in compliance with state law.*" *Id.* at 612 (emphasis added). The Court described at length the practices and procedures that were adhered to by the appropriators, specifically the United States, to comply with state law for perfecting their rights to divert and store water. *Id.* at 613. In several passages, the Court stated that the United States

had complied with Wyoming law in obtaining permits for the North Platte Project:

> Initiation of both projects was accompanied by filings made pursuant to § 8 in the name of the Secretary of the Interior for and on behalf of the United States. Those filings were accepted by the state officials as adequate under state law. They established the priority dates for the projects.
>
> * * *
>
> All of [the procedures for obtaining permits] make plain that those projects were designed, constructed and completed according to the pattern of state law as provided in the Reclamation Act.
>
> * * *
>
> We have then a direction by Congress to the Secretary of the Interior to proceed in conformity with state laws in appropriating water for irrigation purposes. We have a compliance with that direction.

Id. at 613-15. The Court determined that the United States had fully and completely complied with Wyoming state law in obtaining all applicable permits for the North Platte Project, which includes the Inland Lakes. In sum, the point was argued, litigated, and conclusively determined in 1945.

C. Wyoming is Equitably Estopped from Attempting to Change the Historical Use and Operation of the Inland Lakes with a Priority of December 6, 1904

Although all of the essential elements of the Inland Lakes water rights were litigated and determined in the original proceedings, Master Olpin did not base his recommendation solely on the doctrine of *res judicata*. Second Interim Report at 34 (Apr. 9, 1992) (Docket No. 463). He recognized that the Court has announced its reluctance to apply the doctrine of *res judicata* or to import wholesale law-of-the-case principles into original actions. *Id. See Wyoming v.*

Oklahoma, ___ U.S. ___, 112 S. Ct. 789, 796 (1992); *Arizona v. California*, 460 U.S. 605, 618-20 (1983). Judiciously, Master Olpin also based his recommended ruling with respect to the Inland Lakes on "equitable concerns," *i.e.*, finality and repose, as the Court has done when not directly applying the doctrine of *res judicata*.

The Inland Lakes provide a direct example of the need to affirm historical acquiescence and administrative practice based on principles of finality and respose to avoid an inequitable result.[139] Since the early part of the twentieth century, the Inland Lakes have stored natural flow during the non-irrigation season for use during the irrigation season by the appropriators under the Interstate Canal. Since 1945, Nebraska, Wyoming, and the United States have mutually interpreted the Decree as apportioning to Nebraska a right to store 46,000 acre feet in the Inland Lakes in October, November, and April, with a priority of December 6, 1904. Despite 75 years of continuous operation, Wyoming did not attempt to undo the Inland Lakes' priority until *Christopulos* was filed in 1986. Instead, Wyoming affirmed the use and priority of the lakes before, during, and after the original proceedings. Nebraska irrigators have continuously relied on the use of the lakes since 1913.[140] Any change at this late date would be detrimental to the State of Nebraska.

Wyoming complains that Master Olpin's findings were founded on equitable considerations. She claims that because Master Olpin could not find a basis under state law or

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[139]*Cf. Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983).

[140]The Inland Lakes are also integral components of the North Platte National Wildlife Refuge and certain Nebraska state parks and recreation areas. If the Inland Lakes' water supply were terminated, these federal and state wildlife refuges and parks would be stripped of their water supply.

the Decree for the Inland Lakes rights, he resorted to using "equitable concerns" to justify his recommendation. Wyoming's Brief on Exceptions at 56-57 (July 2, 1992). Master Olpin, however, did find a basis in the original proceedings for the Inland Lakes' priority and entitlement and that the right was expressly confirmed by Wyoming's conduct until 1986, creating equitable reliance in Nebraska which should not be disturbed. *See Washington v. Oregon*, 297 U.S. 517 (1936).

Wyoming accuses Master Olpin of drawing the "groundless inference" that the Inland Lakes have been operated with a priority of December 6, 1904, claiming that "a priority was never once exercised or administered for the Inland Lakes." Wyoming's Brief on Exceptions at 59-60 (July 2, 1992). Without blushing, she argues that other reservoirs — which happen to have junior priorities — have complaisantly "postponed" the exercise of their rights to allow the Inland Lakes to fill first. *Id.* at 60.

The Inland Lakes have always been operated and administered with a priority of December 6, 1904. If the Inland Lakes' priority had been a mystery, the parties would not have known to fill the lakes on an equal priority with Pathfinder Reservoir — December 6, 1904 — for the last eighty years. In short, actions speak louder than words.

Another aspect of the Inland Lakes historical operation that Wyoming excepts to is the temporary use of Glendo and Guernsey Reservoirs. *Id.* at 62-63. After reviewing the operation and administration of the Inland Lakes for the past eighty years, and after reviewing the record in the original proceedings, Master Olpin recommended that the Court find that the Inland Lakes right includes the right to use Glendo or Guernsey reservoirs for the temporary storage of the Inland Lakes natural flow during the non-irrigation season. Second Interim Report at 16, 32, 35, 109, 110 (Apr. 9, 1992) (Docket No. 463).

Shortly after Guernsey Reservoir was completed in 1928, it began temporarily storing Inland Lakes water during the non-irrigation season for later transfer to the lakes without objection from Wyoming. First Affidavit of David G. Wilde at 9 (¶ 25) (Aug. 22, 1988) (Docket No. 83). The original litigation came and went, and still Wyoming did not object to this conservation practice. The Decree was amended in 1953 with reference to the use of Guernsey or Glendo by the Inland Lakes, and Wyoming agreed to the construction of the reservoir and an amended Decree. Wyoming did not object to the use of these two reservoirs until July 2, 1992, when she lost her motion for summary judgment on the Inland Lakes before Master Olpin. The sixty-year history of the use of the Guernsey and Glendo reservoirs for temporary storage of natural flows for the Inland Lakes storage account and a review of the original proceedings support Master Olpin's recommendation. *See supra* p. 7-17.

The affidavits submitted by the United States and the State of Nebraska provided the Special Master with expert testimony on the administration and operation of Inland Lakes from Michael Jess, the Director of the Nebraska Department of Water Resources, and David G. Wilde, the North Platte Project Manger for the Bureau of Reclamation. Mr. Jess established that Special Master Doherty's recommended diversion of 46,000 acre feet had been incorporated into the North Platte Ownership and Natural Flow Accounting Procedures approved and signed by the Wyoming State Engineer as late as 1984. *See* [First] Affidavit of J. Michael Jess at 5 (¶ 4), Nebraska's Response to Wyoming's [First] Motion for Summary Judgment (Aug. 22, 1988) (Docket No. 296). Mr. Wilde testified to the operation of the Inland Lakes, as well as the impacts that would result from the changes in operation and administration proposed by Wyoming. *See generally* First Affidavit of David G. Wilde at 6-14 (¶¶ 15-37), 38-51 (¶¶ 73-89) (Aug. 22, 1988) (Docket No. 83). Both were appropriate subjects of expert testimony. Master Olpin not only found Nebraska's and the United States' the evidence overwhelming in this

regard, but concluded further that Wyoming had produced no evidence.

POINT III

THE RECORD ESTABLISHES THAT THE COURT ADOPTED WYOMING'S EVIDENCE IN 1945 WHICH SHOWED THAT THE LARAMIE RIVER WOULD CONTINUE TO CONTRIBUTE TO THE COURT'S APPORTIONMENT OF 75% OF THE NATURAL FLOWS IN THE WHALEN/TRI-STATE REACH TO NEBRASKA

In Special Master Olpin's introductory comments regarding the Laramie River in his Second Interim Report, he noted that "[I] . . . find that a crisp result eludes me on the Laramie." Second Interim Report at 38 (Apr. 9, 1992) (Docket No. 463). Referring to Master Olpin's inability to find a "crisp result," Wyoming has argued that various passages which say that the Laramie apportionment was "in no way affected" by the North Platte Decree should provide the answer that eluded Master Olpin in declining to grant summary judgment.[141] A party moving for summary judg-

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[141]Master Olpin alluded to Master Doherty's statement in 1944 that Doherty was left with "some uncertainty as to Nebraska's position respecting the Wheatland Project and the Laramie River in general. . . ." Doherty Report at 270-71. Master Doherty's concern related only to Nebraska's treatment of the Wheatland Project. Nebraska's position respecting flows below Wheatland was always the same, *i.e.*, that the flows should be apportioned to Nebraska, though Nebraska's evidence indicated that the Laramie inflows were less dependable than indicated by Wyoming's, Colorado's, and the United States' evidence. Doherty's uncertainty went to the fact that Nebraska had cross-examined Wyoming at length regarding the post-Laramie Decree development of Wheatland acreage, suggesting that the inchoate acreage — the late developing and undeveloped acreage — should not have been afforded Wheatland's 1883 priority. Nebraska never argued the point, however, because it contradicted her own position with respect to the Tri-State priority. The purpose of the cross-examination on Wheatland development was to

(cont'd.)

ment on issues on which its opponent bears the burden of persuasion at trial is compelled to show "that there is an absence of evidence to support the nonmoving party's case." *Celotex*, 477 U.S. at 325. Wyoming failed to do so.

A. Laramie Inflows Were Included in the Apportionment

Master Olpin correctly described Wyoming's reliance on the passages indicating that the Laramie Decree was "undisturbed" as only "facially persuasive language. . . ."[142] Second Interim Report at 39 (Apr. 9, 1992) (Docket No. 463). In presenting her evidence of the dependability of the Laramie inflows in the original proceedings, Wyoming herself argued that the Laramie Decree "should not be disturbed," but that the remaining dependable inflows from the Laramie to the North Platte should be accounted in the manner and in the amount proposed by Wyoming's expert. Brief of State of Wyoming, Defendant at 142 (Sept. 5, 1942). Wyoming's position in 1945, including her evidence and the arguments of counsel, should render

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counter Wyoming's attack on Tri-State's slow development, as Master Doherty concluded: "I gather what Nebraska is really contending for is consistency of treatment as between Wheatland and Tri-State. . . ." Doherty Report at 271; *see generally id.* at 270-271, Record at 1607-09; Brief of State of Nebraska, Complainant at 152-175 (Jan., 1945).

[142]Wyoming also relies on the decree in *Wyoming v. Colorado*, 353 U.S. 953 (1957), to which Wyoming and Colorado stipulated, for the proposition that she has an absolute right to *all* of the Laramie River after Colorado's diversions. Wyoming's Brief on Exceptions at 23, 66-67 (July 2, 1992). Master Olpin's response to the argument is the correct one:

> Even if this 1957 Decree were relevant to interpreting the 1945 and 1922 Decrees, my conclusions would not change. Whatever rights Nebraska had to Laramie contributions prior to the 1957 Decree would not have been affected by that new Decree to which she was not a party.

Second Interim Report at 39 n.58 (Apr. 9, 1992) (Docket No. 463).

fanciful Wyoming's arguments to the contrary today.[143] It is also of no small importance that Master Doherty and the Court found the evidence of available flows as presented by Wyoming to be the most credible.

Wyoming also sees inordinate significance in the Court's comparison in 1945 of the South Platte River and the Laramie River:

> The waters of the South Platte and the Laramie were previously apportioned — the former between Colorado and Nebraska by compact (44 Stat. 195), the latter between Colorado and Wyoming by decree. *Wyoming v. Colorado*,. . . . Those apportionments are in no way affected by the decree in this case.

Wyoming's Brief on Exceptions at 65 (July 2, 1992) (citing 325 U.S. at 592 n.1). These "plain words," according to Wyoming, should have produced a definite answer for Master Olpin and for the Court.

Wyoming's argument is another example of her reluctance to examine the record to comprehend the Court's understanding of the evidence providing for the North Platte apportionment in 1945. The purpose of comparing the South Platte Compact and the Laramie Decree was to point out that each party wanted to preserve the existing allocation of flows embodied in those documents. While Wyoming did not want the acreage allocated in the Laramie Decree between Colorado and Wyoming to be challenged, Wyoming did argue that flows were available from the Laramie below Wheatland to meet mainstem needs of Wyo-

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[143]Basin makes the same half-learned argument, adding some florid language. Basin's Brief on Exceptions at 20-26 (July 1, 1992). Recognizing the weakness of her position, Wyoming made three separate estoppel arguments in her first motion for summary judgment on the assumption that Nebraska is entitled to the Laramie waters below Wheatland. *See* Wyoming's First Motion for Summary Judgment at 82-92 (Sept. 11, 1987) (Docket No. 23). Special Master Olpin saw through each of the estoppel arguments.

ming and Nebraska, rather than satisfying those needs with natural flow conveyed from upstream of Whalen. Accordingly, what the Court's language shows is not an exclusion of flows from the Laramie, but a reflection that a portion of the flows was previously apportioned between Colorado and Wyoming which would not be disturbed by the Court.

Wyoming also argues that there was no ambiguity "in Special Master Doherty's exclusion of the Laramie River from his recommended apportionment." *Id.* at 65. Doherty's exclusion, however, was never intended to be a categorical exclusion. Prefacing his recommended decree, he said:

> With respect to the water of the North Platte River and its tributaries, except the Laramie River, I recommend the entry of a decree. . . .

Doherty Report at 177. In his Second Interim Report, Special Master Olpin noted that the Court "did not include this exclusionary language." Second Interim Report at 49 (Apr. 9, 1992) (Docket No. 463). He further stated that he was "not inclined to inflate the significance of this omission, [but that] it may be interpreted as a reluctance to accept that wholesale exclusion."[144] *Id.; see generally* Nebraska's Brief on Exceptions at 18-32 (July 1, 1992). The Court in 1945 was also sensitive to the over-broad "exclusion" because of its amendment of Doherty's proposed ¶ 6 (¶ V) to expressly add the inflows of Spring Creek to all of the other accretions in the Whalen/Tri-State reach reflected in Table III. With the Court's express inclusion of the inadvertently omitted Spring Creek flows in the apportionment in ¶ V, it could not have escaped the Court's understanding that the Laramie inflows had already been included in the fund of water the Court was apportioning 75%/25% in ¶ V of the Decree. *See id.* at 27-32.

[144]Acknowledged as the pivotal section of the river, the Whalen/Tri-State reach was treated differently from the remainder of the basin. The reason that Master Doherty prefaced his recommended decree with an "exclusion" of the Laramie was simply to indicate that the Laramie had been treated differently. It was not examined as part of the drainage basin in the same way the other tributaries were because the drainage basin down to Wheatland had been treated in *Wyoming v. Colorado*. While the Laramie is the major tributary in the Whalen/Tri-State section, it was treated no differently than the other tributaries in the reach insofar as its accretions to the North Platte were concerned.

B. The Allegation that the Court "Failed" to Limit or Enjoin Future Uses of the Laramie is Insignificant

Wyoming argues that because the Decree contains no injunction preventing Wyoming from dewatering the Laramie the conclusion must follow that Wyoming may proceed to dewater it. The purpose of the argument is to prevent Nebraska from pursuing her petition because of the need to "modify" the Decree, *i.e.*, to manufacture an allegedly needed injunction against dewatering before Nebraska could claim something to enforce. Substantively, the argument is not only baseless, but counterproductive.

Pursuing her enforcement/modification argument, Wyoming urges that no injunction appears in the Decree preventing Wyoming from dewatering the Laramie at its mouth; therefore, Nebraska has no provision in the Decree to enforce and Wyoming is thus free to dewater the river.[145] If Wyoming's argument is cogent with respect to the Laramie accretions, it is equally cogent with respect to all of the other accretions in the Whalen/Tri-State reach, the depletion of which was also not enjoined. It follows that the only "accretions" in Whalen/Tri-State reach that Master Doherty and the Court could have apportioned, absent a "modification" of the Decree, was the precipitation that falls on the streambed of the mainstem of the North Platte River between May 1 and September 30. Arguably, the

[145]Stated directly, Wyoming is arguing that she may clip Column 2 from Table III contained in Doherty's report and adopted by the Court, *i.e.*, delete the Laramie accretions to the apportionment fund in the Whalen/Tri-State reach.

Court's express addition of 2,855 acre feet would still be viable, though if the Whalen/Tri-State accretions in Table III had never been intended to have been apportioned, the Court would have had nothing to have added the 2,855 acre feet to.

C. That Master Doherty and the Court Rejected Wyoming's Method of Apportionment Does Not Reflect a Rejection of the Facts Found

Wyoming has argued that her evidence of the continuing contribution of the Laramie inflows to the North Platte was put in the record only in relation to her mass allocation theory. Wyoming's Second Motion for Summary Judgment at 19-20 (Feb. 22, 1991) (Docket No. 294); Second Interim Report at 54-55 (Apr. 9, 1992) (Docket No. 463). This evidence, according to Wyoming, had no independent, technical or hydrologic credibility once removed from the context of legal argument. Accordingly, when Master Doherty rejected her mass allocation theory, her evidence must have died on the vine.[146]

There are two problems with Wyoming's modern-day argument. First, Wyoming cannot be heard in 1992 to assert that Master Doherty's findings of fact as to the dependable, apportionable supply of natural flow were not supported by substantial evidence and therefore should be set aside or ignored. Those findings were made in the 1945 proceeding and Wyoming did not then take exception. Findings of the Special Master once adopted are considered findings of the Court and will not be set aside unless clearly erroneous — certainly not at this late date. Wyoming cannot be heard in 1992 to impeach her own evidence.

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[146]Master Doherty and the Court rejected not only Wyoming's apportionment theory, but Nebraska's and the United States' theories as well, along with Colorado's motion to dismiss. Applying Wyoming's logic, all of the hydrologic evidence was rendered nugatory.

Wyoming has also tried to explain that her mass allocation proposal "would have had a fixed obligation to Nebraska but no fixed source from which she had to fill that obligation — the overall supply in the basin would be a single 'fund.'" *See* Second Interim Report at 54 (Apr. 9, 1992) (Docket No. 463). According to Wyoming, this would have left her free "to completely dry up the Laramie but, if she did so, she would have to meet the delivery obligation [that would have obtained had the mass allocation proposal prevailed] at the state line by restricting uses of the North Platte above Whalen." Wyoming's Second Motion for Summary Judgment at 20 (Feb. 22, 1991) (Docket No. 294).

Wyoming fails to mention that Master Doherty debunked this argument in 1944. Describing Wyoming's mass allocation plan, Doherty stated:

> There was a suggestion that shortages be prorated. How this could be done is not clear. The limitation and distribution being on a seasonal basis, shortages could be determined only at each season's end — too late for proration.

Doherty Report at 116-17. Master Doherty also concluded that Wyoming's plan for a single "fund" was "predicated on the theory that there is sufficient water for all, and hence no necessity for segregation." *Id.* Doherty rejected the view that the water supply was adequate based on Wyoming's own evidence. *See* Wyoming Exhibit Nos. 148 and 173, Nebraska's Appendices at A-334, A-207-20 (Mar. 1, 1991) (Docket No. 296); *see also* Engineers' Stipulation. The Court held that "the inadequacy of the supply is too clear to permit adoption of Wyoming's formula." 325 U.S. at 642.

D. Special Master Olpin's Recommended Remedies Regarding the Laramie Inflows are Appropriate and Correct

After his analysis of the original proceedings, Special Master Olpin determined that Nebraska was given an enti-

tlement to the Laramie River by Master Doherty and the Court in 1945. Second Interim Report at 59 (Apr. 9, 1992) (Docket No. 463). He concluded that the "continued contribution [of the inflows] to the North Platte was assumed," and that "that assumption has governed the administration of the North Platte Decree from its entry until the onset of this litigation." *Id.* at 60. As a consequence, Master Olpin recommends the amendment of ¶ XIII to add a subsection explicitly recognizing the results reached by Master Doherty and the Court in 1945. Paragraph XIII(g) would read:

> Any of the parties may apply at the foot of this decree for its amendment or for further relief.... Matters with reference to which further relief may hereafter be sought shall include, but shall not be limited to the following:
>
> (g) The question of the effect upon the rights of Nebraska or the United States of future water rights administration by Wyoming of the Laramie River that interferes with or threatens to interfere with the flow releases and other obligations of the parties to that certain Agreement of Settlement and Compromise dated December 4, 1978, in *Nebraska v. Basin Electric Cooperative*, No. 78-1775 (D. Neb. 1978).

Id. at 110; 325 U.S. at 671. Master Olpin also recommends that he proceed pursuant to Nebraska's petition to hold a status conference to determine whether "the operation of Corn Creek [will] disturb the delicate balance of the North Platte River and thereby cause injury to Nebraska's apportionment under the Decree." Second Interim Report at 71 (Apr. 9, 1992) (Docket No. 463).

1. Paragraph XIII(g)

Characterizing the proposed remedy as an invitation "to determine whether an apportionment or reapportionment of the Laramie River is warranted as a matter of equity," Wyoming argues that "the Settlement Agreement [resolving the 1978 Grayrocks litigation] does not supersede Wyoming law." Wyoming's Brief on Exceptions at 23, 71 (July 2, 1992). Wyoming's argument, however, misses the import of Master Olpin's recommendation.

In concluding that Nebraska has an entitlement to the Laramie inflows and that the recognition of that 'assumed' right has been made clear by the parties' administration of the Decree since 1945, Master Olpin correctly construed the original proceedings as having provided Nebraska with 75% of **all** of the Laramie inflows to the North Platte. Recognizing that Nebraska agrees that "Grayrocks will not harm her if operated in accordance with the 1978 Settlement Agreement," and that "Basin agrees with Wyoming that Wyoming has so far not interfered in the operation [of Grayrocks, including prescribed releases] pursuant to the 1978 Settlement Agreement," Master Olpin's recommendation addressed Nebraska's right to continued reliance of the Laramie inflows to the extent the Settlement Agreement does so. Second Interim Report at 66 (Apr. 9, 1992) (Docket No. 463). This is not a new apportionment or reapportionment, but rather an informed and smart way of resolving the matter.

2. Corn Creek Status Conference

Wyoming describes Master Olpin's proposal to proceed with a status conference on Corn Creek's depletions in terms of the untethered theory that the conference is "designed to consider whether in equity an apportionment or reapportionment of the Laramie is warranted." Wyoming's Brief on Exceptions at 73 (July 2, 1992). Nebraska's petition alleges threatened depletions of both the Laramie inflows and the mainstem North Platte if the Corn Creek

Project were to be built. The Project would deplete Laramie and North Platte flows far beyond the amount mentioned in the Settlement Agreement.[147]

In conclusion, Nebraska disagrees with Master Olpin regarding the Laramie River only to the extent that he did not recognize more than the 'assumption' of a continuing right to the Laramie inflows. Master Olpin, however, viewed Nebraska's earlier arguments as seeking an "implicit" apportionment of the Laramie inflows. Accordingly, he proceeded with caution. Nebraska believes that the record demonstrates the express apportionment of the Laramie inflows beyond doubt. We therefore urge that the Court adopt Special Master Olpin's recommendations with respect to the Laramie River, with the further recognition that the Laramie inflows were directly apportioned in ¶ V of the Decree.

POINT IV

THE RECORD DEMONSTRATES THAT GENUINE ISSUES OF MATERIAL FACT EXIST REGARDING INJURY TO NEBRASKA'S APPORTIONMENT RESULTING FROM THE PROPOSED CONSTRUCTION OF THE DEER CREEK PROJECT

Wyoming argues that she should summarily be allowed to build a multi-purpose storage project on Deer Creek, a tributary to the North Platte River between Pathfinder Reservoir and Guernsey Reservoir, because: 1) The affida-

[147]Wyoming tried previously to eliminate the effects of the Corn Creek Project on the theory that it would likely never be developed and thus posed no imminent threat. When the principal proponent of the Project, former Governor Stanley Hathaway, however, caught up with his "old friend," Counsel of Record for Wyoming, the Corn Creek Project came to life again. *See* Second Interim Report at 70 (Apr. 9, 1992) (Docket No. 463).

vits incorporated in her motion for summary judgment and in Nebraska's responses reveal that Nebraska has failed to set forth "clear and convincing evidence [of] a serious and imminent threat to [her] apportionment for uses diverting at or above Tri-State Dam;"[148] 2) ¶ X "exempts" municipal uses from review under the Decree; and 3) certain allegedly "undisputed facts" warrant judgment without trial. *See generally* Wyoming's Brief on Exceptions at 38-50 (July 2, 1992). Wyoming has distorted the little evidence she discusses and has failed to discuss the evidence presented in the counter-affidavits which demonstrates the existence of genuine issues of material fact, *i.e.*, the evidence which Special Master Olpin has evaluated.

A. Wyoming's First Motion for Summary Judgment

After stating in her first motion for summary judgment in 1987 that the storage of natural flows in the proposed Deer Creek Reservoir would "*unlikely* . . . conflict with the water supply for the Nebraska canals specified in the Decree," Wyoming argued:

> The Decree places specific restrictions on the diversion, storage and use of water in each of the three states. None of those restrictions applies to Wyoming's use of water from the tributaries entering the North Platte River below Pathfinder Reservoir. Wyoming's use of water from those tributaries cannot, as a matter of law, violate the Decree.

Wyoming's First Motion for Summary Judgment at 77, 92 (Sept. 11, 1987) (Docket No. 23) (emphasis added).

[148]The Court should note Wyoming's limitation of potential injury to one area, *viz.*, the 43-mile Whalen/Tri-State reach. Wyoming has not discussed the proven injury to Nebraska's storage interests above Whalen, to the apportionment for the use by the Inland Lakes below Tri-State, or to the potential impact on return flows which formed a basis of the apportionment. *See supra* p. 23-29; *infra* p. 90-95.

Despite the specific provision which provides that the effect of tributary storage should be examined if an imminent threat is raised, Wyoming argues that Nebraska may not avail herself of ¶ XIII(c) because the Court **must first** reach a conclusion **before** a ¶ XIII(c) examination. Catch-22.

Following this argument, Wyoming stated that "[t]here is no dispute that ... Deer Creek Reservoir will result in certain depletions to the flow of the North Platte River," referring to ¶ 3(c) of her answer. *Id.* at 90. Wyoming further stated that "[t]he precise amount and timing of depletions [caused by the Project]" are not stated, but that Nebraska had alleged that they could be as high as 25,000 acre feet annually. *Id.* at 90-91. Wyoming then argued that:

> Even if that fact issue is still in dispute, it is immaterial to the question of whether Deer Creek Reservoir violates the Decree ...
>
> * * *
>
> Wyoming has a right under the Decree to construct Deer Creek Reservoir regardless of the precise amount and timing of its depletions to the North Platte. ...'[149]

Id. at 91.

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[149]Wyoming also argued in 1987 that the Decree is the source of its unlimited right:

> The Decree, in effect, apportioned to Colorado and Wyoming the right to use water from the North Platte and its tributaries for future ordinary and usual domestic uses without restriction.

Wyoming's First Motion for Summary Judgment at 96 (Sept. 11, 1987) (Docket No. 23). In 1992, Wyoming argues the opposite, *i.e.*, the "Decree is not the source of, but only a limitation on, Wyoming's authority to use and permit the use of water of the North Platte River or its tributaries, ..." Wyoming's Brief on Exceptions at 19 (July 2, 1992).

The principal problem with Wyoming's argument the first time around was that the Deer Creek Project is not a municipal project. The FEIS prepared in relation to the § 404 permit states that the non-municipal uses of Deer Creek would include "irrigation and industrial water supply, flood control, fish and wildlife resource enhancement and recreation purposes." *See* First Affidavit of Ann S. Bleed at 18 (¶ 6) (Aug. 22, 1988) (Docket No. 81).

The second factual problem with Wyoming's first motion arose out of the depletions that the Deer Creek Project would cause not just to the canals diverting in the Whalen/Tri-State reach, which is the only area of potential injury that Wyoming has related to the Court, but to the injury above Whalen and to the Inland Lakes. Nebraska's evidence showed that Deer Creek Reservoir "frequently [would store] water despite [more senior] Pathfinder and Kendrick ownerships not being filled." First Affidavit of H. Lee Becker at 22 (¶ 4) (Aug. 22, 1988) (Docket No. 81). Mr. Becker also testified that the operation of Deer Creek Reservoir according to Wyoming's own model would deplete the end-of-year or carry over storage for the same two federal reservoirs serving both Nebraska and Wyoming lands. *Cf.* 325 U.S. 666 (¶ III). For the period 1951-1983, Pathfinder storage was reduced an average of 9,000 acre feet per year and Kendrick storage was reduced an average of 46,000 acre feet per year. During a period of less precipitation, 1965-1983, Pathfinder was reduced by an average of 9,400 acre feet and Kendrick by 77,000 acre feet annually.

A witness for the United States, David G. Wilde, who was the Project Manager for the North Platte River Project Office near Casper, Wyoming, testified at length in regard to the injury that would be caused by the construction and operation of the Deer Creek Project to the existing federal projects serving lands in both Nebraska and Wyoming. *See* First Affidavit of David G. Wilde at 33-38 (¶¶ 64-72), 42-51, (¶¶ 79-89) (Aug. 22, 1988) (Docket No. 83). Mr. Wilde concluded that the federal "projects [would] be

substantially impacted during a period of extended drought" if Deer Creek Reservoir were built and not administered for all senior downstream water rights. *Id.* at 51. If the proposed project were administered as junior to the storage rights of Glendo, Guernsey, and the Inland Lakes, the impacts would still be substantial, but "minimized." *Id.* Wyoming discusses none of this evidence in maintaining that Nebraska has not presented sufficient evidence to warrant a trial. Wyoming's Brief on Exceptions at 38-43 (July 2, 1992).

B. Wyoming's Second Motion for Summary Judgment

In her second motion for summary judgment, Wyoming tried to circumvent the genuine issues of material fact by ignoring the potential depletions she admitted in her first motion for summary judgment by arguing more strenuously that the evaluation of potential injury must be limited to the Whalen/Tri-State reach. On her exceptions to Master Olpin's report, Wyoming takes the same tack:

> In support of her second motion for summary judgment, Wyoming pointed out that none of the affidavits by Nebraska's and the United States' experts had demonstrated any material injury by Deer Creek Reservoir to Nebraska's apportionment under the Decree — to the supply for Nebraska lands irrigated by diversions between Whalen and Tri-State Dam.

Id. at 40. Wyoming then emphasizes that in Mr. Becker's affidavit of April 25, 1991, it was stated that the proposed project Deer Creek "*could* limit diversions in the Whalen to Tri-State reach in a series of dry years." *Id.* at 41 (emphasis Wyoming's). Wyoming tries to persuade the Court that Master Olpin relied solely on this statement to find sufficient evidence to conclude that Nebraska met her burden of

proof.[150] Because of the use of the word "could," Wyoming characterizes Mr. Becker's testimony as "mere speculation of some possible impact on the diversions in the Guernsey to Tri-State section." *Id.* at 42.

Letting out more slack, Wyoming mixes and matches affidavit testimony relating to two different computer programs. Special Master Olpin was not fooled by Wyoming's attempt to ignore significant issues of material fact presented by the affidavits relating to injury caused by the proposed Deer Creek Project, including injury in the Whalen/Tri-State reach. Second Interim Report at 74-77 (Apr. 9, 1992) (Docket No. 463). He recognized that two separate computer programs had been discussed, each showing significant effects in different geographical areas. *See supra* p. 20-22. The NPRSM was Wyoming's computer program designed to obtain a § 404 permit for the proposed Deer Creek Project by minimizing depletions on flows below the Tri-State Dam, thereby avoiding an adverse decision under the ESA. Fourth Affidavit of H. Lee Becker at 8-9, (¶ 2) (Apr. 25, 1991) (Docket No. 335)

Realizing the need to show the least amount of depletions in flows past Tri-State Dam in order to meet FWS criteria, Wyoming backed into its computer program by using simulated output as an input parameter. In order to reduce depletions below Tri-State Dam to avoid a jeopardy opinion under the ESA, Wyoming's program pushed the significant depletions of Deer Creek upstream to the federal storage reservoirs. Under the NPRSM, the end-of-year carryover storage for both the Pathfinder and Kendrick ownerships

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[150]Wyoming fails to bring to the Court's attention Mr. Becker's conclusion during the debate over Wyoming's first motion for summary judgment: "[T]he operation of Deer Creek Reservoir *will* reduce the end of year (carryover) storage for both the Pathfinder and Kendrick ownerships. . . ." First Affidavit of H. Lee Becker at 22 (¶¶ 5 & 6) (Aug. 22, 1988) (Docket No. 81) (emphasis added). Mr. Becker's testimony was fully supported by Mr. Wilde's testimony.

were reduced by as much as 9,400 acre feet and 77,000 acre feet annually. First Affidavit of H. Lee Becker at 22 (¶ 5) (Aug. 22, 1988) (Docket No. 81); First Affidavit of David G. Wilde at 43-46 (Aug. 22, 1988) (Docket No. 83). In short, the NPRSM reduced depletions at and below Tri-State Dam at the expense of significant depletions on upstream federal storage reservoirs. Neither the Corps of Engineers nor the FWS was concerned with Deer Creek's effects on the federal storage reservoirs. Therefore, the large depletions in upstream reservoir storage were of no significance to Wyoming in obtaining its § 404 permit. In the administrative forum, Wyoming deliberately diminished the impacts measured at Tri-State Dam, while ignoring depletions on upstream federal storage reservoirs.

The Deer Creek issue is now in a judicial forum in which the Court must assess how the Deer Creek Project would affect the interests of Nebraska and the United States. In conjunction with the present litigation — and quite aside from the contrived results of the NPRSM — Nebraska developed a computer program which simulates the actual operation and administration of the North Platte River and the facilities located thereon. Third Affidavit of H. Lee Becker at 40-47, (¶¶ 1-10) (Mar. 1, 1991) (Docket No. 296); *see also* Fourth Affidavit of H. Lee Becker at 9 (¶ 3) (Apr. 25, 1991) (Docket No. 335). The Deer Creek Project was evaluated using this simulation model. The resulting depletions on the upstream federal storage reservoirs are much less, while there are much greater impacts on flows below the Tri-State Dam. *Id.*

The NPRSM is the computer program of record upon which the proposed Deer Creek Project must be operated. Wyoming has obtained state and federal permits based

upon the representations produced by the program, and the Deer Creek Project must be evaluated accordingly.[151] Nebraska's program relating to the proposed Deer Creek Project has utility in assessing the NPRSM and the actual operation of the proposed project without contrived parameters. Through the NPRSM, Wyoming deliberately chose to transfer the depletions of the proposed Deer Creek Project to the federal reservoirs to avoid jeopardizing the critical habitat of threatened and endangered species. Wyoming cannot now advocate the use of Nebraska's computer program to counter Nebraska's claim of injury to upstream storage. Special Master Olpin concluded, as did Mr. Becker, "that 'the impacts can be transferred from one location to another, but they cannot be obliterated.' " Second Interim Report at 77 (Apr. 9, 1992) (Docket No. 463) (quoting Mr. Becker's affidavit of April 25, 1991).

Even confining injury to the Whalen/Tri-State reach, the affidavits of H. Lee Becker and David G. Wilde present genuine issues of material fact regarding significant depletions caused by the proposed Deer Creek Reservoir. Special Master Olpin made a determination in this regard with respect to Wyoming's first motion for summary judgment. Nothing has changed the presence of the issue for trial. Master Olpin concluded that Nebraska met her burden of demonstrating genuine issues of material fact simply on the

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[151]In issuing the § 404 permit, the United States was aware that Wyoming could attempt to change Deer Creek's operation once the permit was issued. In response, the United States stated in the Record of Decision that "should the project be operated in a manner different than that provided by the Applicant and described in the EIS, the impacts as described in the EIS would need to be reevaluated." Record of Decision, Deer Creek Dam and Reservoir at 20. The Record of Decision states that the U.S. Army Corps of Engineers would have the discretion to reevaluate the project at any time. To avoid reevaluation, the Project must be operated pursuant to the NPRSM. If there were a reevaluation under § 404 due to increased depletions at and below Tri-State Dam, a jeopardy opinion would likely be rendered.

basis of the depletions to carryover storage in the federal projects, "even [on] the most stringent civil standard. . . . in contradicting the moving party's factual claims." *Id.* at 13.

C. Paragraphs X and XIII(c)

Nebraska has explained her view of Master Olpin's misreading of ¶¶ X and XIII(c) in her Brief in Support of Exceptions. *See* Nebraska's Brief on Exceptions at 32-54 (July 1, 1992). That explanation will not be repeated here. In her exceptions to the Special Master, however, Wyoming notes that ¶ X states that "[t]his decree shall not affect or restrict" municipal uses, arguing:

> 'This Decree' plainly means the whole Decree, including Paragraph XIII(c). Therefore, an action under the retained jurisdiction of Paragraph XIII(c) to consider the effect of the construction of storage capacity on tributaries between Pathfinder and Guernsey Reservoirs cannot affect or restrict municipal uses.

Wyoming's Brief on Exceptions at 44 (July 2, 1992).

In making the argument, however, Wyoming creates anomalies she cannot explain away. First, if "this decree" means the whole Decree, ¶ X must supercede ¶ XII(a), which provides that "[t]his decree shall not affect . . . [t]he relative rights of water users within any one of the States," *i.e.*, priority of appropriation. It follows that the Deer Creek Project could not be built because its municipal purpose is to overcome priority of appropriation as between the City of Casper and downstream senior irrigators and industrial users.

Second, if Wyoming is correct that "[t]his decree plainly means the whole Decree," ¶ X would create not only an exemption from ¶ XIII(c), but also ¶ XIII(f). Accordingly, the Decree could never be modified under the Court's retention of jurisdiction no matter what municipal depletions would result from changed conditions. In other words, a city the size of Denver could develop anywhere in

the North Platte system in Colorado or Wyoming notwithstanding the obvious subversion of the irrigation apportionment that would result.[152]

Finally, one of Wyoming's principal theses which ostensibly explains what "led [Master Olpin] to recommend the wrong result," is that the Decree does not grant any affirmative rights, but simply places limits on Wyoming's authority to use North Platte waters. *Id.* at 19. However, this is the opposite of Wyoming's assertion that ¶ X cuts through ¶ XII(a), ¶ XIII(c), ¶ XIII(f) and thus affirmatively grants municipalities rights that supersede Wyoming law.

D. Wyoming's "Undisputed" Facts

Wyoming summarizes her arguments regarding Deer Creek by describing two undisputed facts which "establish that the proposed municipal uses of Deer Creek Reservoir are ordinary and within the plain meaning of Paragraph X and no trial is necessary."[153] *Id.* at 47. These alleged undisputed facts are:

> 1) The proposed Deer Creek Reservoir will supply water to the City of Casper, Wyoming and other smaller municipalities along the North Platte River in Wyoming. [Citations omitted].

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[152]In the original litigation, the parties fought over less than 3,000 acre feet of water. 325 U.S. at 648. It defies common sense to argue that the parties agreed to give municipal uses a *carte blanche* to gut the irrigation season apportionment, including the construction of a new 66,000 acre feet reservoir which would impound twenty-two times the amount of the disputed Spring Creek flows.

[153]This plain meaning is the one which inverts the subject and object of the sentence and simultaneously changes the predicate from the negative to the positive.

> 2) The types of uses supplied by Casper and the other Wyoming municipalities to be served by Deer Creek are like those supplied by Nebraska municipalities in the North Platte Basin. [Citations omitted].

Id. at 46-47. Again, however, with respect to the former "fact," Wyoming neglects to explain that the Deer Creek Project was planned and permitted as a multi-purpose project which must be operated as represented to the Corps of Engineers in the § 404 permitting process and according to her state permits. *See supra* p. 18-23. With respect to the later "fact," Wyoming seeks to avoid an evaluation of the project under ¶ XIII(c).

Quite aside from the genuine issues of material fact relating to the proposed project's adverse effects on Nebraska's apportionment from the upstream reservoirs to the Inland Lakes, there are genuine issues of disputed fact regarding the project's relation, if any, to ¶ X. The assertion that "Nebraska concedes that ordinary and usual municipal use is within Wyoming's apportionment under the Decree," was pulled out of the air in relation to these exceptions. Wyoming's Brief on Exceptions at 44 (July 2, 1992). Nebraska has never made such a concession.[154] Nebraska firmly believes that the plain reading of ¶ X, which provides that "[t]his decree shall not affect or restrict" municipal uses, must not invert the subject and object of the sentence and simultaneously change its predicate from the negative to the positive.

[154]Wyoming is referring to an argument made by Nebraska when Nebraska was laboring under the illusion that ¶ X could be construed as creating "a municipal exemption," *i.e.*, an affirmative grant of municipal water rights, based on a misreading of the plain language of the sentence. Nebraska had argued that if there were a municipal exemption, giving Casper and other municipalities rights above Wyoming law, ¶ X would immunize Casper from calls by senior irrigators and industrial uses intrastate. Accordingly, under *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), which stands for the proposition that an apportionment is paramount to state law, the Deer Creek Project would have been absolutely unnecessary because Casper could continue diverting out-of-priority. The earlier argument, however, has no application to Nebraska's understanding of ¶ X as explained to Master Olpin and to the Court.

Finally, Wyoming contends that Master Olpin erred by indicating that trial should be held on issues of fact such as the "economic feasibility of Deer Creek Reservoir, the efficiency of Deer Creek Reservoir and policy decisions about alternatives to Deer Creek Reservoir. . . ." *Id.* at 21. Wyoming argues that these issues are "inappropriate for judicial resolution." *Id.*

Special Master Olpin has no intention of holding trial on Wyoming's "policy decisions," which he has told Wyoming before. Second Interim Report at 85 (Apr. 9, 1992) (Docket No. 463); *see also* Transcript of Proceedings (June 7-8, 1991). Because the proposed Deer Creek Project, however, would be located on a tributary entering the North Platte River between Guernsey Reservoir and Whalen Dam, the project must be considered pursuant to ¶ XIII(c). The Court was aware that new tributary storage in this reach could upset apportioned water uses, and the Court expressly retained jurisdiction to examine the effects of proposed projects.

Also, water supply alternatives vary in efficiency. Some projects "give more water bang for the buck." Transcript of Proceedings (June 7-8, 1991). If an alternative can be pursued that is less detrimental to a contiguous state's apportionment, that alternative should be considered under *Colorado v. New Mexico*, 459 U.S. 176 (1982).

POINT V

NEBRASKA IS ENTITLED TO 75% OF THE NATURAL FLOW IN THE WHALEN TO TRI-STATE REACH WITH THE RIGHT TO ADMINISTER HER EQUITABLE APPORTIONMENT AMONG HER CANALS ACCORDING TO NEBRASKA STATE LAW

In her brief in support of her exceptions, Wyoming has explained that:

> [Her] first motion for summary judgment sought to simplify the case and narrow the issues for trial by confirmation that Nebraska's apportionment under the Decree is 'limited to the water supplies for Nebraska lands irrigated by the canals identified in the Decree that divert at or upstream of Tri-State Dam. . . .'

Wyoming's Brief on Exceptions at 11-12 (July 2, 1992). During discovery following Master Olpin's denial of Wyoming's first motion, Wyoming maintained that:

> It became apparent [to her] that Nebraska was claiming under her present petition that the Decree entitles her to the continuation of historical return flows and historical direct flow past Tri-State Dam *even though it is undisputed that those flows were surplus to the requirements of the canals in the Guernsey to Tri-State section.*

Id. at 12 (emphasis added). Wyoming explained that as a consequence:

> [She] then sought summary judgment on Nebraska's claims that Wyoming is violating or threatening to violate the Decree 'to the extent they are based on (1) alleged reduction of direct flow passing Tri-State or (2) alleged reduction of return flow from diversions in excess of the water requirements of the North Platte Project canals and the Nebraska State Line Canals.'

Id. at 13. Wyoming then took "exception to the Special Master's refusal . . . to recommend summary judgment denying Nebraska's claims of violation of the Decree *to the extent such claims are based on allegations of injury to uses diverting below Tri-State Dam.*" *Id.* at 14 (emphasis added).

Ostensibly, three issues were raised before Master Olpin: 1) whether the case should be "simplified" and the issues "narrowed;" 2) whether Nebraska is claiming or "demanding" that flows pass Tri-State Dam; and 3) whether the Decree places limitations or caps or individual Nebraska canals diverting at or above Tri-State.[155] With respect to the first issue, Wyoming has not explained to the Court the ulterior reality of her motion. The second issue is simply not an issue. Special Master Olpin's recommended granting of summary judgment on the third issue is supported unequivocally by three aspects of the original proceedings: 1) Special Master Doherty's determination that his findings regarding "requirements" were not to be construed as limitations on individual canals; 2) the equitable apportionment adopted by the Court as set forth in ¶ V of the Decree granted to each state the right to allocate her share of the natural flow; and 3) the fact that ¶ IV was a restriction on upstream reservoir storage, not canal diversions.

A. Wyoming's Alleged Effort to Simplify the Case is an Attempt to Retain Water in Upstream Storage for Use in Wyoming

In the Court's first decision in *Colorado v. New Mexico*, 459 U.S. 176 (1982), it was stated that "wasteful or inefficient uses will not be protected," suggesting strongly that the

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[155]Nebraska and Wyoming filed cross-motions for summary judgment on whether the Decree placed absolute ceilings on diversions and irrigated acreages for individual Nebraska canals in the Whalen/Tri-State reach. Nebraska's Motion for Partial Summary Judgment and Brief in Support of Motion at 5-7, 61-68, 115-41 (Mar. 1, 1991) (Docket No. 296); Wyoming's Second Motion for Summary Judgment at 3-5 (Docket No. 294). Master Olpin granted Nebraska's motion in this regard.

Court might impose stricter standards of conservation in interstate water disputes than might be imposed under state law. *Id.* at 184. The Court also stated that "equitable apportionment [has been invoked] not only to require the reasonably efficient use of water, but also to impose on States an affirmative duty to take reasonable steps to conserve and augment the water supply of an interstate stream." *Id.* at 185.

As noted above, the Tri-State issues arose out of Wyoming's counterclaim, which focuses on the concept that "beneficial use is 'the basis, the measure and the limit of the right to use water.' " Wyoming's Brief on Exceptions at 37 (July 2, 1992). Pursuing this principle in terms of modern-day farm management and irrigation practices, Wyoming is in the process of assembling evidence to try to prove that Nebraska irrigation districts — the Pathfinder Irrigation District, for example, — are inefficient and wasteful.[156] Pursuant to *Colorado v. New Mexico*, Wyoming's object is to show that water diverted above Tri-State need not be diverted and thus can be stored in Wyoming reservoirs because the total diversions are allegedly "in excess of the water requirements. . . ." *Id.* at 13.

Wyoming, however, faces an unmanageable legal problem in the form of a predicate to the equitable apportionment in *Nebraska v. Wyoming*. The denial of a direct apportionment to the lands below Tri-State Dam and west of Bridgeport was predicated on their continued use of return flows during the irrigation season which constituted the available "local supplies." *See supra* p. 23-29. Increasing "efficiencies" in the districts served by the canals in the Whalen/Tri-State reach necessarily causes a corresponding decrease in return flow upon which the downstream users have relied since the inception of the North Platte Project

[156]Nebraska's evidence will establish that such districts are neither inefficient nor wasteful.

some 80 years ago. Such a reduction would also effectively cause a reapportionment. A single example can illustrate the point.

In Table II of Master Doherty's report, he describes the estimated requirements for the canals diverting in the Whalen/Tri-State reach, including the Interstate Canal. The Interstate Canal delivers water directly to the Pathfinder Irrigation District, the largest district within the North Platte Project (98,000 acres). The Tri-State Canal, further downstream, serves not only the Farmers Irrigation District (52,300 acres), but also the Northport Irrigation District, which is a part of the North Platte Project (13,000 acres). As is shown in the Appendix at A-2, the acreage under PID is situated to the north of the river between the Interstate Canal and the Tri-State Canal, above the lands of Northport Irrigation District, which also lie further to the east (cross hatched). Additionally, the Interstate Canal is a "highline" canal, situated above the uppermost irrigable acreage. The Tri-State Canal is lower in elevation, delivering water first to the Farmers' Irrigation District in the area of Scottsbluff and then to the Northport Irrigation District.[157]

In Table II of Doherty's report, he estimated the Northport District's requirement to be 54,600 acre feet annually. He made the following notation, however:

> The full Tri-State requirement for 52,300 acres at 3.5 acre feet per acre is 183,050 acre feet, **but this canal has in the past intercepted and utilized certain flows below the Tri-State Dam, which averaged yearly during the 1931-1940 period 35,500 acre feet (W-149).** Deducting this from 183,050 leaves 147,750 (called

[157]The initial engineering design of the North Platte Project contemplated extending the 120 Interstate Canal to serve the Northport Irrigation District. It was subsequently determined that it would be more efficient to extend the 80 mile Tri-State Canal to serve the NID lands.

> 148,000) shown above as the Tri-State requirement on water from Wyoming. These interceptions will presumably in the future go to the Northport Irrigation District under the decision of *United States v. Tilley*, 124 F. (2d) 850. They are charged here against Tri-State to correspond with some requirement and historical supply tables to follow. Later in priority and apportionment studies they will be charged to the Northport.

Doherty's Report at 59 n.2 (emphasis added). In *United States v. Tilley*, 124 F. 2d 850 (8th Cir. 1942), the Eighth Circuit held that certain return flows from North Platte Project lands could be utilized as a matter of right by the Northport District. *Ibid* at 862.

In Table XVII of Master Doherty's report, reference was made to the canal priorities and requirements. Master Doherty again qualified the annual value estimated for the Tri-State Canal:

> The value for Tri-State assumes that the historical interceptions (35,500 acre feet annually) by this canal below the state line will in the future be delivered to the Northport District, in compliance with the decree in U.S. v. Tilley, 124 F. (2d) 850.

Doherty Report at 87 n.1. Master Doherty also noted that the North Platte District "supplies a total of 13,000 acres, but 8,452 acres will be supplied in the future by interception below [the] state line," *i.e.*, by return flows below Tri-State Dam. *Id.* at n.3.

The lands in the Northport Irrigation District constituted a part of the equities used to derive the 75%/25% division of the apportionment fund in the Whalen/Tri-State reach. As a clear predicate of the apportionment and because of limitations in the capacity of the Tri-State Canal, the vast majority of the Northport Irrigation District lands can only be supplied by waters intercepted below Tri-State Dam. These are part of "the return flows approximating historic averages" from the "inefficient" and "wasteful" canals that

Wyoming, Colorado, and Basin so obstreperously maintain that Nebraska has no right to. While Nebraska does not claim that these flows were apportioned for direct application to beneficial use in the Whalen/Tri-State reach, Nebraska insists that users of return flows are among the group of users that Nebraska is not only entitled to protect but is obligated to protect under the Decree. These users, like the 8,452 acres in the Northport District served by return flows, have no other adequate source of water and would be forced to cease irrigating if return flows were curtailed.

The advisory opinion that Wyoming seeks in the guise of summary judgment to "simplify the case" and "to narrow the issues" is designed to prevent Nebraska from proving injury to second and subsequent users of return flows at trial. For instance, Wyoming is aware that proof of injury to downstream users would preclude forcing increases in "efficiency" on Pathfinder Irrigation District because PID's level of efficiency in 1945 is the foundation of Northport's ability to survive. In other words, what Wyoming is seeking in reality is an increased apportionment of her own at the expense of Nebraska equities which were accounted in the apportionment and which continue to rely on return flows from North Platte waters which are not diverted for direct use at or above Tri-State Dam.

B. Nebraska has Neither "Demanded" Nor Claimed Continuing Flows Passing Tri-State Dam

Wyoming contends that it has become "apparent" that Nebraska is claiming direct flows passing Tri-State Dam. Wyoming's Brief in Exceptions at 12 (July 2, 1992). What is "apparent" to Wyoming is neither expressed in Nebraska's petition nor claimed by Nebraska. *See generally* Nebraska's Petition (Oct. 6, 1986) (Docket No. 1). Nebraska is not seeking an enlargement of her apportionment. While the continuation of significant direct flows passing Tri-State Dam was a basis upon which the equitable apportionment was determined, an examination of Nebraska's petition

shows that no claim is made in this regard.[158] *See supra* p. 23-29; *see also* 325 U.S. at 607, 655; Doherty Report at 95-96, 158. Wyoming, Colorado and Basin all appear to forget what Nebraska has stated repeatedly, *i.e.*, that "Nebraska does not claim direct flow past Tri-State Dam as part of [her] apportionment and has never demanded such . . . flow during the irrigation season." *See* Nebraska's Response to Wyoming's and Colorado's Motions for Summary Judgment and to Basin Electric's Memorandum in Support Thereof at 42 (Apr. 25, 1991) (Docket No. 335).

C. "Requirements" are not "Limitations"

Based on a thorough review of the record, Master Olpin found that the "Decree does not impose absolute ceilings for Nebraska's diversions in the Whalen to Tri-State section on a canal-by-canal basis." Second Interim Report at 92 (Apr. 9, 1992) (Docket No. 463). In her brief on exceptions, Wyoming continues to maintain that in the original litigation, "the water requirements of the specific irrigation canals diverting in the Guernsey Dam to Tri-State Dam section of the river were litigated and determined as the measure and the limit of Nebraska's right to demand water from Wyoming." Wyoming's Brief on Exceptions at 20 (July 2, 1992). Completely unsupported by the record, Wyoming seeks new restrictions on Nebraska's apportionment which are not contained in the Decree. The facts are undisputed that Nebraska's apportionment in the Whalen/Tri-State reach of the river is 75% of the natural flows, with the discretion to allocate that share among her canals pursuant to Nebraska law. *See supra* p. 29-31.

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[158]The Tri-State Diversion Dam was recently retrofitted, curtailing a significant amount of the seepage of natural flow through the Dam, *i.e.*, a component of the operational waste that Master Doherty took into account in balancing the equities among the states. In 1989, 10 acre feet of natural flow passed the Tri-State Dam during the irrigation season. Second Affidavit of Ann S. Bleed at 28 (¶ 2) (Mar. 1, 1991) (Docket No. 296).

When Master Doherty evaluated the Whalen/Tri-State reach of the North Platte River, he undertook an analysis of each canal's water use. Doherty Report at 53-92; 196-253. The Special Master explained the reason for his analyses of individual canals:

> While a decree in a water suit between States cannot, generally speaking, deal with individual appropriations or projects, yet in such a situation as that here presented the equitable shares of the States cannot well be arrived at except through an analysis of the requirements, priorities, and equities of the individual canals as well as the water supplies available for the lands served by them.

Id. at 54. For each canal in the section, Master Doherty made determinations as to acres actually irrigated and total diversion requirements in acre feet per year and cubic feet per second.[159] These numbers were called "requirements" by Master Doherty, but he explicitly rejected the contention that these determinations would operate as limitations on the canals or on the states in administering their equitable apportionments:

> In arriving at the equitable share of each State I have first determined for that purpose the *requirements* of the various canals or districts. Is this to be taken as a determination of the limits of beneficial use for the purpose of intra-state administration? If so, those limits would apply to both storage and natural flow water.

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[159]The Special Master determined the number of acres actually irrigated and the water required to irrigate those acres based on a drought cycle. Farming practices necessarily reflected the decreased water supply. To use Special Master Doherty's figures as restrictions would constrain today's agricultural economy in western Nebraska to the 1930s conditions. The Special Master and the Court equitably apportioned the North Platte River. They did not intend to restrict the distribution of available flows.

Wyoming feels that such a limitation should be placed on the Nebraska State Line Canals for its effect upon the conservation of storage water. From a practical standpoint, and perhaps from an equitable standpoint, this might be a proper and desirable measure. From a legal standpoint, I doubt the jurisdiction of this Court to fix such limitations upon individual canals. The suit is between States and jurisdiction is invoked to determine the equitable rights of the States, that is, to determine the proper apportionment of water between them. The requirements of individual appropriators in each State being one of the elements in the ascertainment of the State's equitable share, they are incidentally a proper matter for investigation and determination for their bearing on the ultimate issue. But it would be quite a different matter to undertake to define the rights of individual appropriators between each other or between them and their State, or to determine what portion of the State's share must be allocated to any appropriator or group of appropriators, or to place a limit upon the participation of any appropriator or group in such allocation. That, in the absence of the appropriators as parties, would, I apprehend, as to them amount to a denial of due process of law. Consequently, the findings herein as to *requirements* cannot, I think, be deemed a limitation upon individual canals or groups, in actual administration, either as to natural flow or storage water, nor do I think any such limitations can properly be imposed by the decree.

Id. at 160-61 (emphasis in original).

Master Doherty also stressed the importance of each state being able to administer her equitable share as she saw fit, without interference from a neighboring state:

> An interstate priority schedule [as suggested by Nebraska] would necessarily interfere with the freedom of each State in the intrastate administration of the State's share of the water. It would have the effect of fixing the rights of appropriators within each State as between each other. Constitutionality of a decree having this effect would appear to be open to serious question in view of the absence of the appropriators as parties to the case.

Id. at 115. *See also id.* at 149-50.

Master Doherty took extensive evidence on the requirements of canals in the Whalen/Tri-State reach to determine the "proper" allocation for this river section in order to equitably apportion the natural flows between Nebraska and Wyoming. *See* Second Interim Report at 95 (Apr. 9, 1992) (Docket No. 463). Special Master Doherty did not adjudicate the water rights of individual appropriators. On the contrary, he stated: "The share of each State, determined by the established ratio, would be subject to administration by that State in any manner it saw fit or the rights of its appropriators might require." Doherty Report at 150. As Master Olpin concluded from his analysis and review of the original proceedings, Special Master Doherty was "unequivocal" in his recommendation that the Decree would leave to each state the administration of her share of the natural flow. Second Interim Report at 95 (Apr. 9, 1992) (Docket No. 463).

The Whalen/Tri-State apportionment arrived at by Master Doherty and accepted by the Court is a 75%/25% division of natural flows between Nebraska and Wyoming. Doherty Report at 179 (¶ 6); 325 U.S. at 667 (¶ V). Each state has the discretion to allocate her share according to state law.[160] Accordingly, no requirements, limitations, or restrictions were placed on the North Platte Project or the

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[160]The Interstate, Fort Laramie, French, and Mitchell canals were individually listed in ¶ V for designation of natural flow because they all had headgate diversions in Wyoming at that time. 325 U.S. at 619. Master Doherty and the Court deemed the language necessary to assure *(cont'd)*

State Line canals within Nebraska's 75% share, and none can be implied.

Wyoming relies on ¶ IV of the Decree to make her argument regarding "limitations" on all of Nebraska's canals in the Whalen/Tri-State reach as the measure and limit of Nebraska's apportionment. In broad terms, ¶ IV operates as Wyoming's "delivery obligation" to assure water in the Whalen/Tri-State reach. It is unrelated to any question of intrastate administration of either state's allocation among her canals in any given year.

Paragraph ¶ IV is an injunction only against Wyoming and the storage of water in the upstream storage reservoirs. 325 U.S. at 666 (¶ IV). Without some restriction, the upstream junior reservoirs would have been able to store water during the irrigation season and essentially dry up the river downstream, thus consuming Nebraska's apportionment.[161] The cumulative water requirements for the individual canals were used to define Wyoming's gross "delivery obligation," but they were not intended to interfere with

---

that Wyoming would comply with Nebraska's requests in allocating her 75% share of the natural flow among her canals with points of diversion in Wyoming.

[161]Master Doherty knew that the canals in the Whalen/Tri-State reach, specifically the State Line Canals in Nebraska, were dependent on upstream North Platte River water for their supply. Doherty Report at 136-43. He also knew that Wyoming refused to administer the North Platte River to recognize these senior priorities in Nebraska. Wyoming law required priority administration for canals diverting in Wyoming, including the North Platte Project canals, thus legally assuring their water supply.

Nebraska's intrastate administration of her apportionment.[162] The reservoirs were enjoined accordingly.[163]

If there were merit to Wyoming's "limitations" argument, ¶ IV would have contained an injunction against Nebraska that confines individual canals to stated diversion quantities. Instead, there is a restriction on Wyoming's administration in order to preserve the downstream water supply. Master Doherty had previously explained that jurisdictionally he could not fix restrictions or limitations on individual canals. Doherty Report at 160-61.

With the exception of the injunction against Wyoming in ¶ IV, there is no correlation between the exercise of the storage rights of the upstream reservoirs and the rights of Nebraska's senior downstream canals to enjoy their rights under Nebraska law within Nebraska's apportionment. Even when the upstream reservoirs exercise their storage rights under ¶ IV, there can still be accretions in the Whalen/Tri-State reach that may be diverted by the downstream senior canals. Accordingly, the injunction against Wyoming in ¶ IV is not a limitation on individual canal diversions within Nebraska's broader apportionment.

---

[162]Special Master Olpin also saw ¶ IV as a gross "delivery obligation." Second Interim Report at 98-99 (Apr. 9, 1992) (Docket No. 463). He specifically found that "there is nothing in the Decree that can be read to forbid shifting deliveries among the senior canals so long as the junior storage rights of the reservoirs are not harmed thereby." *Id.* Master Olpin correctly interprets the Decree. *Cf.* Wyoming's Brief on Exceptions at 36 (July 2, 1992).

[163]Certain figures had to be inserted as quantities available for diversion by the State Line Canals before the reservoirs could store in order to establish the rights between the upstream reservoirs and the downstream canals. These figures were not meant as limits on diversions, and Master Doherty made this clear. In the recommended decree, he prefaced the referenced paragraph with "for the purpose of this clause . . ." the canal limitations will be as follows. Doherty Report at 177-78. Likewise, the Court confirmed that the limitations in ¶ IV were for "[the] purpose" of determining rights between upstream, junior reservoirs and downstream, senior canals. 325 U.S. at 625.

Wyoming's position on limitations was also raised in the original proceedings and was rejected by the Court, making Wyoming's present argument *res judicata*. On exceptions to Master Doherty's Report in 1945, the United States sought to place limitations on Nebraska's canals in ¶ IV, exactly as Wyoming now contends. 325 U.S. at 628-29. After briefing and argument, the Court rejected the United States' argument finding that the imposition of limitations was not consistent with the equitable apportionment it was ordering, further concluding that such limitations were not necessary as a practical matter. *Id.* Wyoming's present argument was raised, litigated, and determined in the original proceedings and thus is *res judicata*.

Additionally, there is absolutely no basis for Wyoming's proposition that Nebraska would receive an unlimited supply of water if limitations are not placed on the State Line Canals.[164] Wyoming's Brief on Exceptions at 37 (July 2, 1992). Since the entry of the Decree, Nebraska has been limited to 75% of the natural flow in the Whalen/Tri-State reach of the North Platte River. Because of the manner in which the river is administered, Nebraska cannot receive an unlimited supply.[165]

Finally, Wyoming admits that the Decree contains no injunctions prohibiting Nebraska from allocating her share

[164]Beneficial use is the basis, the measure, and the limit of a diversion in Nebraska. This is a principle of Nebraska law and forms the basis of Nebraska's administration of her share of the natural flow. Nebraska does not agree, however, that in formulating the Decree, the Court or Master Doherty intended to artificially determine beneficial use for individual canals in the form of diversion restrictions or that they intended these "limits" to apply in perpetuity.

[165]By the operation of the river and through the system of accounting done independently by Nebraska, Wyoming, and the United States, neither Nebraska nor Wyoming can receive more than her allocated apportionment, unless the river is in a high flow condition or the other state is not in need of her share.

(cont'd)

of the natural flow, but argues that discretion in distributing her allocation under Nebraska law can happen only "when there is surplus water available for such diversion." *Id.* at 35. The Decree contains no qualification that Nebraska can only allocate her 75% share of the natural flow in the Whalen to Tri-State reach when there is surplus water in the system, nor is there any basis to imply such a qualification. To the contrary, the Court and the Special Master wanted to assure that both Nebraska and Wyoming would share the surpluses, as well as the deficiencies, of the North Platte River on an annual basis. Doherty Report at 120.

Special Master Olpin found that there were no material facts in dispute on the absence of diversion ceilings for the canals in the Whalen to Tri-State reach. Second Interim Report at 12 (Apr. 9, 1992) (Docket No. 463). He found the record "unequivocal" and filled with "uncontradicted facts." *Id.* at 95. Wyoming points to nothing in the record to show that the Master Olpin erred in his interpretation and recommendation.

On an annual average basis, the Whalen to Tri-State reach receives only about 50% of the natural flow needed to meet the irrigation needs of Nebraska's canals diverting in that reach. The deficiency has to be made up with storage water purchased from the Bureau of Reclamation.

CONCLUSION

The parties have taken very different approaches to their exceptions to Special Master Olpin's first and second interim reports, both in substance and in style. Wyoming would like the Court to ignore the Special Master, with Colorado and Basin Electric following suit. In Wyoming's view, the Court should reject the Master's findings and recommendations after an independent review of the evidence, including the affidavits of the present-day administrative officials from Nebraska, Wyoming, and the United States, the documents reflecting the administrative construction of the North Platte Decree since 1945, Master Doherty's report, and the original proceedings. Based on the arguments of all of the parties, Nebraska believes that the Court should adopt Master Olpin's reports, with two modifications, in recognition of the knowledge he has developed in dealing with the issues over the past six years.

Comparing the positions of the parties reveals three fundamental differences. The most conspicuous difference lies in the pursuit of the enforcement/modification theme by Wyoming, Colorado, and Basin. Nebraska has taken a more time-consuming approach, involving the recitation of the facts material to the resolution of the questions presented and then applying the law to the facts in regard to the specific issues raised in the exceptions.

The relation between the positions of the parties on specific issues in 1945 and their positions today frames a second contrast. With respect to the apportionment of the Laramie River inflows in ¶ V of the Decree, Nebraska takes the same position today as she did in 1945. Wyoming takes a diametrically opposite position. With respect to the apportionment of the use of the Inland Lakes, Nebraska's positions are the same. Wyoming's are polar.

The parties also have noticeably different views of the meaning of the North Platte Decree. Instead of reading the plain language of ¶¶ X, XII(a), XIII(c), and XIII(f) in a

clear and perceivable manner, free from obstruction, Wyoming reads these unambiguous provisions in a way that engenders obstruction and mutual conflict. Nebraska's reading of these provisions gives ordinary and expected meaning to their terms, resulting in mutual consistency and integration. With respect to the ambiguous provision or the provision which is incomplete on its face — ¶ V — Wyoming ignores the record and urges that the underlying apportionment of the Laramie inflows cannot be accomplished without rewriting the provision. Nebraska, on the other hand, believes that resort to the record makes the apportionment clearly manifest.

Nebraska finds fault with two elements of Special Master Olpin's findings and recommendation. One derives from a mind-set initially shared by all of the parties and Master Olpin, namely, that ¶ X of the Decree creates a "municipal exemption" which includes an affirmative grant of the right, conferred by the Decree, to deplete the natural flows of the North Platte River and undermine the irrigation apportionment. Nebraska urges the Court to modify Master Olpin's recommendations to conform to the plain reading of ¶ X.

Nebraska also finds fault with Master Olpin's failure to conclude that 75% of the Laramie inflows were apportioned to Nebraska in ¶ V of the Decree, notwithstanding that he concluded that Nebraska's continuing entitlement to the Laramie inflows was "understood." Accordingly, Nebraska requests that the Court modify Master Olpin's recommendations to reflect that the Laramie inflows were apportioned 75% to Nebraska in 1945.

Finally, Nebraska would like to reiterate her conviction that the Court's resolution of the cross-motions for summary judgment will not resolve the issues framed in Nebraska's pending motion for leave to apportion the non-irrigation season flows and to assert new claims.

Respectfully submitted,

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APPENDIX

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IN THE

Supreme Court of the United States

No. 6 Original

THE STATE OF NEBRASKA,
Complainant,

vs.

THE STATE OF WYOMING,
Defendant,

THE STATE OF COLORADO,
Impleaded Defendant,

UNITED STATES OF AMERICA,
Intervener.

BRIEF OF DEFENDANT, STATE OF WYOMING

LOUIS J. O'MARR,
Attorney General.

W. J. WEHRLI,
Special Counsel.

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of the element of carry-over storage, the flow of a particular year, or what might be determined to be a dependable annual flow, is not the measure of the stream's ability to meet demands, and we must determine what the dependable supply is; that is to say, how much water can be furnished each year to meet requirements from the production of a series of years conserved and carried over by reservoir use. The principles applicable we find set forth in Wyoming v. Colorado supra, but in that case, since there was no reservoir conservation in the upper state and no carry-over storage from year to year, it was found adequate to determine the dependable flow of the stream. The same principles should be applied here, but the "dependable supply" instead of "dependable flow" should be ascertained. In the language of the opinion in that case, it is the "supply which is fairly constant and dependable, or is susceptible of being made so by storage and conservation within parcticable limits" which should govern. We need not here be concerned with the question of practicability, as the storage reservoirs are in actual existence.

The storage capacity of the three upper reservoirs, which we have been discussing, as set forth by the Master, is 175% of the long-time average run-off of the stream at Pathfinder Reservoir (M.R. p. 36). The run-off at Pathfinder is extremely variable, having been as low as 382,200 acre feet in 1934, and as high as 2,399,400 acre feet in 1917 (M.R. p. 23). A 37 year average, 1904 to 1940, as determined by the Master was 1,315,900 acre feet (M.R. p. 24). Total capacity of the three reservoirs, as disclosed by the Engineers' Stipulation and set forth in a tabulation hereinabove is 2,261,000 acre feet. These reservoirs are very obviously designed for the purpose of carrying over storage from one year to the next and the stream can not be beneficially utilized unless they are so employed.. To make such use, the down-stream diversion each May-Septemeber period must be limited to actual requirements, and surplus supplies retained in the reservoirs for succeeding years.

Guernsey Reservoir (M.R. p. 30), is located a few miles above Whalen and is used primarily for regulatory purposes, while Lakes Alice and Minatare (M.R. p. 30) are located in Nebraska, and used in connection with the Interstate Canal. These three reservoirs are all used in connection with the North Platte Project, but are comparatively small in size, and not particularly useful for conservation of supplies from year to year.

The Wyoming water supply study, presented by witness Elmer K. Nelson and comprised in Wyoming exhibits numbered 170 to 176 inclusive, uses as a basis of supply the actual run-off of the years 1904 to 1940 inclusive, reduced to represent present conditions of development as to present irrigation in Colorado, in Wyoming on all tributaries, and upon the main stream above Guernsey, exclusive of the Kendrick Project. Since the Master has determined that all present uses in Colorado, and those upon tributaries in Wyoming and upon the main stream above Guernsey, exclusive of the Kendrick Project, should be enjoyed without restriction, but that additional development should be enjoined, the assumption of the Wyoming study agrees exactly with the findings and conclusions of the Master. However, in the Wyoming study an allowance was made for additional depletion above Pathfinder of 68,500 acre feet annually (M.R. p. 65). The Whalen-Tri-State Dam seasonal requirement of the Wyoming study was 950,000 acre feet, while that proposed by the Master is 1,027,000 (M.R. p. 65). The testimony set forth in the appendix hereto attached, relating to Wyoming Exhibit 176, and the exhibit itself, disclose that the Wyoming study also made allowance for an October-April release of 10,000 acre feet at Pathfinder (Record p. 27,576, Appendix p. 23). The assumed demand upon the stream of the Wyoming study therefore is 950,000 acre feet for the Whalen-Tri-State Dam section, 68,500 for additional depletion above Pathfinder, and 10,000 for winter release, or a total of 1,028,500 acre feet. This is 1,500 acre feet in excess of the demand proposed by the Master, and consequently the conclusions of the Wyoming study are not disturbed if the Master's proposed requirement is substituted. It should be pointed out that the figures above given do not include a winter diversion at Whalen of 46,000 acre feet for Lakes Alice and Minatare reservoirs proposed by the Master (M.R. p. 61), or a similar diversion of 65,000 acre feet proposed by Wyoming (M.R. p. 60). Neither of these values affects the ultimate conclusions because a diversion of either amount in the winter months can be made without any release from the upper storage reservoirs for that purpose.

As above stated, the Wyoming study is predicated upon the use of run-off as it actually occurred, reduced to accord with what it will be in the future under present conditions of development. Wyoming Exhibit 170 shows the run-off for the years 1904 to 1940 inclusive at Pathfinder Reservoir, and at a

lative of the Master's findings and conclusions and of the principles announced by this Court in Wyoming v. Colorado, supra.

At page 141 of his report the Master admits that it may be suggested that the proposed regulation, with reference to the Kendrick Project, is inconsistent with the view expressed, that the decree may not deal with the rights of individual appropriators or parties. We do make such suggestion and emphatically urge it upon the Court. We do not find any justification for the action of the Master in making such a recommendation as he has with reference to the Kendrick Project, for the reasons set out at page 141 of his report wherein he states that the legal owner of the storage appropriation is the United States and that storage facilities are operated by the United States, and that consequently some regulation may be proposed not otherwise applicable. As found by the Master, in this respect, the United States occupies the same position as any other appropriator, and this was determined by this Court in ruling on Wyoming's motion to dismiss, (295 U. S. 40). It is also stated at page 141 of the Master's Report, that Wyoming has not objected to regulation of natural flow diversions supplying the Kendrick Project upon jurisdictional grounds.

The statement is in error as this Defendant has never proposed any solution of the case which would purport to fix or determine the rights of the Kendrick Project, or the Casper canal, except as one of the elements in a determination of equitable apportionment between Wyoming and Nebraska.

The report of the Master makes a type of mass allocation, as to all sections of the stream except the Whalen-Tri-State Dam section and the Kendrick Project. The restrictions to present uses in Colorado and upon tributaries in Wyoming and from the main stream above Whalen, exclusive of the Kendrick Project, are an acceptable form of mass allocation. We perceive no reason for departing from established principles as to the Whalen-Tri-State Dam section and the Kendrick Project.

The Master has determined that 46,000 acre feet may be diverted at Whalen to the inland reservoirs of the Pathfinder

Irrigation District, Lakes Alice and Minatare, during the winter months (M. R. pp. 60, 61). This, too, is an acceptable form of mass allocation. As to the Whalen-Tri-State Dam section, the Master has determined a requirement of 1,027,000 acre feet to be necessary in the May-September period (M. R. pp. 60, 61). This can readily be divided between Wyoming and Nebraska on the basis of the tables appearing at pages 59 and 86 of the Master's Report. Inadvertently an error was made in the report in computation of the Wyoming requirement, same appearing at page 163 as 227,000 acre feet. Quantities shown for Wyoming land in Table II, page 59, are as follows:

Goshen Irrigation District	137,500 acre feet
Wright and Murphy Lands	577 acre feet
Lingle and Hill Districts	46,000 acre feet
Nine Wyoming Private Canals (Including French lands in Wyoming)	43,000 acre feet
Total	227,077 acre feet

This, no doubt, is the derivation of value at page 163, but there is omitted the Wyoming lands in the Pathfinder Irrigation District comprising 2,300 acres with a requirement of 9,844 acre feet, as shown in Table XVII, page 86 of the report. Adding this requirement to that above shown, makes a total of 236,921 for which, a round value figure of 237,000 may be used, leaving 790,000 acre feet for Nebraska use, or total sectional requirements of 1,027,000. The actual Nebraska total, according to the tabulation on page 59 of the Master's Report, is something less than 790,000, but for practical purposes the total requirement of 1,027,000 should be divided—237,000 to Wyoming and 790,000 to Nebraska.

The diversion requirement of the Kendrick Project is 168,000 acre feet (M. R. p. 138). A mass allocation of these May-September requirements should be made, resulting in an allocation of 790,000 acre feet to Nebraska and 237,000 plus 168,000, or 405,000 to Wyoming.

We have pointed out in the preceding discussion relating to water supply, that during the period 1895 to 1940 inclusive, lands presently irrigated in Colorado, and lands presently

age of the "net cropped acreage" 1931 to 1940 is 82,577 and 1936 to 1940, 81,030.

A liberal delivery at the land of 1.8 acre feet per acre has been allotted and a distribution system loss of 58 per cent which, according to the Master, if it is in error, errs on the upper rather than on the lower side. It also seems apparent that a liberal acreage value has been used and one which is considerably in excess of the actual irrigated acreage under present conditions. An exact adjustment of these different values would require the consideration of a large amount of testimony. We believe the demands of justice can be met by reducing the acreage to the 1936-1940 average of the "developed farms irrigable acreage" or, in round figures, 94,500 acres. Since it is necessary to divert 4.28 acre feet per acre at the headgate to deliver 1.8 acre feet per acre at the land, with a loss factor of 58 per cent (M.R. p. 213), the total reduction we propose is 4.28 acre feet per acre for 3,500 acres, or 15,000 acre feet.

One of the elements which must be considered in determining the May-September requirement of the Pathfinder Irrigation District, under the Interstate canal, is the amount of water which can be diverted to the inland reservoirs serving the Pathfinder District lands, Lakes Alice and Minatare. The capacities of these reservoirs are respectively 11,400 and 67,000 acre feet (M.R. p. 30). The Master's allowance for winter diversions to the reservoirs is 46,000 acre feet (M.R. pp. 60, 61). Whatever is diverted to these reservoirs in the winter months reduces the May-September requirement as the water is stored and used in the succeeding irrigation season. In our opinion the Master's Report (pp. 60, 61) contains no adequate explanation for the allowance of only 46,000 acre feet. It is said that icing of the canal may have been a factor in past operations (M.R. p. 61). We have been unable to find any evidence in the record supporting such a conclusion.

Storage impounded in the Government reservoirs is utilized for the Pathfinder Irrigation District, and Barry Dibble, a witness for the United tSates testified that 73,000 acre feet could be diverted to Lakes Alice and Minatare during the winter months (Record pp. 28696, 28697). This witness made the water supply study comprised in U.S. Exhibits 267 to 273, discussed in the Master's Report, pages 65 to 67 inclusive. This study covered the period from 1926 to 1940, and Mr. Dibble used

as basis for his May-September demand the diversion of 73,000 acre feet to the inland reservoirs during each winter season. The Dibble testimony on this subject appears at pages 78 and 79 of the Appendix. We know of no reason why this testimony as to the winter diversion may not be accepted. Upon the same subject Elmer K. Nelson, witness for Wyoming, testified that diversions of 65,000 acre feet could be made in the winter months to the inland reservoirs (Record, pp. 27444-27446).

If the testimony of Mr. Dibble is used, the May-September requirement of the Pathfinder Irrigation District will be reduced 27,000 acre feet, which is the difference between 46,000 acre feet of winter diversions, specified by the Master, and 73,000. The lands served by the inland reservoirs lie wholly within the State of Nebraska.

No mention whatever is made in the Master's Report of a supply that is available from pumps for Nebraska lands in the Pathfinder Irrigation District. The testimony is undisputed and appears at page 29243 of the Record. The project history of the Pathfinder Irrigation District for the year 1940, as quoted at page 29243, is as follows:

> "An important factor in curing seeped conditions of farm lands is the fact that seventy-five irrigation wells were drilled and operated by pumping during the past season. There was about 7,640 acre feet of water pumped from the underground supply and 550 acre feet from drains. The total water pumped was equal to almost sixteen per cent of the amount of water delivered to the lands."

The supply diverted at the headgate for this canal in 1940 was quite low, as shown by Table VII, page 76 of the Master's Report. If such a supply of water as is disclosed was available from pumps in such a low water year as 1940, it is obvious that it would not be less, but would probably be considerably more under less adverse conditions.

Since the 7,640 acre feet is available at the land and the distribution system loss of the Pathfinder Irrigation District is 58 per cent (M.R. p. 213) this supply is the equivalent of 18,000 acre feet at the headgate, as it would require the latter amount of water diverted at the headgate with loss of 58 per cent in

1. Enjoining Colorado (a) from the diversion of water for the irrigation in North Park of more than 135,000 acres of land, (b) from the accumulation in storage facilities in North Park of more than 17,000 acre feet of water between October 1 of any year and September 30 of the following year, and (c) from the transbasin diversion out of North Park of more than 6,000 acre feet of water between October 1 of any year and September 30 of the following year.

2. Enjoining Wyoming (a) from the diversion of water from the main river above Guernsey and from its tributaries above Pathfinder Reservoir for the irrigation of more than 168,000 acres of land, and (b) from the accumulation of storage water in reservoirs above Pathfinder Reservoir in excess of 18,000 acre feet of water between October 1,of any year and September 30 of the following year. This is exclusive of Seminoe Reservoir and the Kendrick Project, which are given consideration elsewhere.

3. Enjoining Wyoming from the diversion of water from the North Platte River for the irrigation of lands of the Kendrick Project and the Wyoming lands served by diversions at and below Whalen of more than 405,000 acre feet in each irrigation season, May to September inclusive, providing that until five years have elapsed immediately following the commencement of irrigation of lands of the Kendrick Project, the limitation shall be 342,000 acre feet, and further providing that irrigation under the Kendrick Project shall not be commenced until the first year in which storage in the upper storage reservoirs, Seminoe, Pathfinder and Alcova, plus anticipated in-flow equals 1,000,000 acre feet, and that until the year in which such irrigation is commenced, the Wyoming allotment shall be 237,000 acre feet.

4. Enjoining Nebraska from the diversion of water from the North Platte River in the Whalen-Tri-State Dam section for Nebraska lands of more than 705,000 acre feet in each irrigation season, May to September inclusive, and from obtaining the conveyance past the Tri-State Dam of any water originating above that point for diversion from the North Platte River below Tri-State Dam, and permitting diversion of 73,000 acre feet to the inland reservoirs of the Pathfinder Irrigation District, Lakes Alice and Minatare, during the winter months, October 1st to April 30th, inclusive.

5. Providing that the May-September supplies mentioned in the preceding paragraphs 3 and 4 shall be delivered in accordance

NOTE "DO NOT FOLD THIS FORM —ONLY FORMS COMPLETED WITH TYPEWRITER OR NEATLY LETTERED WITH BLACK WATER-PROOF INK WILL BE ACCEPTED"

P. CARP
R. McCann

Form C-1
Rev 1-71

THIS SECTION IS NOT TO BE FILLED IN BY APPLICANT

Filing Priority Date

THE STATE OF WYOMING
STATE ENGINEER'S OFFICE } ss

This instrument was received and filed for record on the 9 day of February A.D. 19 71 at 9:20 o'clock A. M.

James H. Aduddell, Asst. State Engineer

Recorded in Book ____ of Reservoirs Page ____ Fee Paid $2.00 Map Filed 2

STATE OF WYOMING

OFFICE OF THE STATE ENGINEER

APPLICATION FOR PERMIT TO APPROPRIATE SURFACE WATER

WATER DIVISION NO. 1

PERMIT NO. _____ RESERVOIR

DISTRICT NO. 15-5

Time Filing No. 2/9/71

NAME OF FACILITY

THE Deer Creek RESERVOIR

I, Peter J. Hutchison

of Cheyenne City or Town, County of Laramie

State of Wyoming for myself, or in behalf of the applicant or applicants named in Item 1, do say:

1. The name(s) and complete mailing address(es) of the applicant(s) is/are Wyoming Water, Inc. P. O. Box 1407, Cheyenne, Wyoming 82001

2. The use to which the water is to be applied is Irrigation Recreation, M & I.

3. The source of the proposed appropriation is Deer Creek, tributary of North Platte River

4. The center of the proposed reservoir is located N 20° 30' E 3862.6' from the SW corner of Section 11, T 31 N, R 77 W, and is in the S½ SE½ of Section 11, T 31 N, R 77 W.

The formation of the outer retainer of

5. Fill one either (a) or (b)

(a) The reservoir is located in the channel of Deer Creek

(b) The reservoir is to be filled through the _____ Canal, which has a carrying capacity of _____ cubic feet per second.

6. (a) The area of the high water line of the reservoir is 1055 acres.

(b) The total available capacity of the reservoir is 18785 acre-feet.

(c) If enlargement, the capacity of the enlargement is _____ acre-feet.

(d) Reservoir Capacity Breakdown by Uses

[redacted] 427
[redacted] ACRE-FEET

7. (a) The dam is to be constructed as follows: An impervious core of bentonite is to be filled as the earth fill is brought up - bentonite mixed as filled and rolled. Contains 7,550,000 Cubic Yards

(b) The water face of the dam is to be protected from wave action in the following manner: Rene additional type fire cases filled with rock

8. The estimated cost of said work is $ 7,750,000.00 Dollars

9. Construction work will begin within 1 year from date of approval of this application.

10. The estimated time required for completion of the work is 3 year(s).

11. The accompanying map is prepared in accordance with the State Engineer's Manual of Regulations and Instructions for filing applications and is hereby declared a part of this application.

Under penalties of perjury, I declare that I have examined this application and to the best of my knowledge and belief it is true, correct and complete.

Peter J. Hutchison WyoPE #1241
Signature of Applicant or Agent

Date 2/8/1971

Printed Name _____

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NOTE: If construction under this application is for enlargement of an existing reservoir, comment on the enlargement should be omitted below from the general remarks.

REMARKS

RESERVOIR CAPACITY BREAKDOWN BY USES

Dead Storage 822 Ac/Ft.
Irrigation 1362 Ac/Ft.
Recreation 1717 Ac/Ft.
Municiple 2000 Ac/Ft.
Industrial 60084 Ac/Ft.
Total Available Capacity = 65,785 Ac/Ft.

APPLICATION FOR A WATER SUPPLY PROJECT ON DEER CREEK, TRIBUTARY OF NORTH PLATTE RIVER FOR MUNICIPAL AND MULTI-PURPOSE WATER DEVELOPMENT INCLUDING THE CITY OF CASPER, WYOMING

December, 1978

1. Applicant
   A. Casper Board of Public Utilities, 200 North David, Casper, Wyoming 82601, phone 235-8266.
   Duplicate correspondence to Frank J. Trelease, Manager Cheyenne Office, Wright Water Engineers, 3228 Locust Drive, Cheyenne, Wyoming 82001, phone 638-9261.
   B. Entity Representative
   Mr. Sam Hobbs, Utility Director
   Water Resources Consultant: Frank J. Trelease
   C. Reasons for applying for a state water resources project.
   The attached "Summary Report on Casper Water Supplies and Needs" briefly states the reason for the Casper Board of Public Utilities seeking additional water supplies. It has been estimated that the Casper population will increase from 49,000 in 1977 to 84,800 by the year 1990 and to 112,000 past the year 2000. This population will demand additional water supplies as stated in the Summary Report. The City needs to develop supplies to meet these increased demands. In addition, the State Engineer has indicated that increasing water rights scrutiny on the North Platte River may result in regulation of municipal water rights once thought exempt from regulation because of the provisions of the North Platte decree relating to ordinary domestic and municipal water use.

   The options open to Casper and other municipal water users along the North Platte River apparently are:
   1) To transfer senior irrigation water rights from irrigation use to municipal use;

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2) To use water made available through development of the unused waters of the North Platte River tributaries below Pathfinder Dam;
3) To use water from trans-basin diversions into the North Platte River;
4) Develop ground water supplies.

The Casper Board of Public Utilities is proceeding to pursue several of these options. It is the desire of the Board (as has been expressed by the State) that agricultural water not be transferred to other uses, but that municipal and industrial water supplies should be developed from the remaining undeveloped supplies that Wyoming has available.

There are obvious intrastate and interstate implications of development of the waters of the North Platte River tributaries below Pathfinder Dam. Although these waters, according to the North Platte decree, are not regulated by the decree, development of the water will obviously be scrutinized by the State of Nebraska. In the scheme of regulation of the River there are implications to other Wyoming water rights and availability of water. We, therefore, believe that the State of Wyoming should be involved in water development projects on the North Platte River tributaries in order to determine the feasibility of the project or alternatives, the feasibility of State project financing, and to assist in estimating the available water supplies.

An additional reason that the State should be involved in tributary water developments is that they should be multi-purpose in nature. There is a possibility for development of irrigation, storage, regulation of water supplies for fisheries, wildlife and recreation purposes, while providing for municipal use. These beneficial uses can relate to the public at large and to groups beyond the City of Casper. Therefore, it seems most logical that the State should be a catalyst in the development and play a prime coordinating and, perhaps, project management role.

The City of Glenrock approached the Casper Board of Public Utilities in the spring of 1978 with the idea

of developing this project. The Board has responded to the City of Glenrock, but has received no acknowledgement. We believe, therefore, this is a second reason that the State should be involved — that is to coordinate the interests of Casper, Glenrock and possibly others in the project. Additionally, we are aware that Wyoming Water Inc. filed an application to construct a reservoir on a potential site on Deer Creek. We believe the third reason the State should be involved is to correlate that interest along with the interests of the two municipalities, the public interest in such a project, and combining the interests of other potential water users.

D. Cooperative water development
The Casper Board of Public Utilities is interested in a cooperative water development with the State of Wyoming, who would correlate the interests of other water users and project purposes.

2. Project Description and Map
A. Description
A project description and map are not included herewith because the State of Wyoming can refer to Wyoming Water Planning Program Report No. 9, "Water and Related Land Resources of the Platte River Basin, Wyoming." Figure 5-1 on page 159 of that report shows the location of the potential Deer Creek Dam and Reservoir and a description of the Deer Creek project is given on page 161 of the report. In September, 1971, the date of the report, the State was considering a reservoir of some 85,000 acre feet capacity, including purposes of flood control, municipal and industrial storage, irrigation storage, and a minimum pool for recreation purposes. Minimum flows down Deer Creek were incorporated in the State's project plan, along with the delivery of municipal and industrial water. The files and records of the Wyoming Water Planning Program contain the preliminary engineering analysis contained in the State Water Plan.

In addition, the Office of the State Engineer was presented a reconnaissance report prepared by the firm of R. W. Beck for Wyoming Water Inc. Having

reviewed that report, we found that they had increased the estimated municipal and industrial water supply yield but had underestimated the demands of the senior Deer Creek irrigation water rights, and, in our opinion, had not adequately estimated the irrigation water demand and effect of senior water rights on the project. We, therefore, believe that a water supply review is necessary before proceeding with pre-feasibility or feasibility studies of the project.

There are, however, probably enough data upon which to base preliminary cost estimates to that once the water supply estimate is completed, a pre-feasibility or reconnaissance type of cost-benefit analysis can be performed.

B. Project Lands and Soils
The information is in the State files.

C. Water Supply and Hydrology Studies
1) Water Supply Information — see A above.
2) Project Water Rights
The application to construct a dam and reservoir by Wyoming Water Inc. is temporary filing permit number 21 6/198, priority — February 9, 1973; source — Deer Creek; capacity — 69,915 acre feet; uses — irrigation, municipal, industrial supply; location — Section 11, T 31 N, R 77 W.
3) Legal Water Supply Limitations, etc.
There is no known protest or other type of legal action affecting the project.

Deer Creek is a tributary of the North Platte River in Wyoming between Pathfinder Dam and Guernsey. The U.S. Supreme Court decree on the North Platte River controls the irrigation use and storage of water on the main stem North Platte River above Guernsey Dam and on the tributaries of the North Platte River and the main stem in Wyoming and Colorado above Pathfinder Dam. Since Deer Creek is a tributary not included in the provisions of the decree, it is presumed that the State of Wyoming has a water supply that can be developed in Deer Creek. Nevertheless, Article XIII (c) states, "The question of the effect of the construction or threaten the construction of stor-

age capacity not now existing on tributaries entering the North Platte River between Pathfinder Reservoir and Guernsey Reservoir, "— is a matter to which "further relief may hereafter be sought."
4) Water Quality Data
The waters of Deer Creek are suitable for the purposes and uses included in this application. Analysis of water quality should be done along with water supply studies.
5) Contracts With Others To Supply Water
The City of Casper does supply water to entities in and around the city which relate to the general supply of water. There are no specific contracts relating to the Deer Creek project.
6) Acquisition Of A Water Supply By Contracts From Others
The City of Casper is seeking to contract for an interim water supply from the reservoirs of the Kendrick Project — Seminoe and Alcova. This contract with the USBR has not been consummated. We are working with the Casper-Alcova Irrigation District in this matter and on a longer range acquisition of water supply, which would meet a portion of the future water needs of the City of Casper.

D. Engineering Data
All investigations of geology, foundation, materials, etc. and preliminary engineering layouts and costs are available in the offices of the State Engineer and the Wyoming Water Planning Program.

E. Economic and Social Considerations
No specific economic or social studies have been done by the City of Casper relating to this project. However, the State of Wyoming has endeavored to estimate the costs and benefits of the water supply and the overall impact of developing or not developing the water supply upon the future of the State. This information could be readily assembled from economic models and engineering and cost information.

3. Environmental
   A. Environmental Assessments
      The Wyoming Water Planning Program did contract with the University of Wyoming WRRI for an analysis of minimum stream flows in Deer Creek required for a project on the stream. In addition, WWPP discussed the project with the Game and Fish Department in the development of the State Water Plan. Nevertheless, additional environmental work is necessary before the project could be consummated. It may be that an environmental assessment should be a part of preliminary studies, particularly if federal lands are involved in any way.
4. Other Permits and Applications
   No attempt has been made at obtaining any other city, county, state, federal permits inasmuch as this is believed to be an outcome of initial studies relating to the project.
5. Financial
   Casper has not prepared any financial analyses other than to estimate the cost of developing water from Deer Creek Dam will be rather expensive compared to acquiring other supplies, such as purchasing and transferring water rights. It is because State policy to preserve irrigation and prudent water management would seem to indicate that unused water supplies should be developed not at the expense of agriculture that a State project is sought, hoping that the financial burden can be shared among other project purposes and that the cost of public use of facilities might be borne by a public entity, the State, to whose citizens the benefits will accrue.
   In addition, through the Wyoming Water Development Fund or other mechanism, it is hoped that a financing plan can be derived which would defray the cost of the project water supplies until the population has increased to the point where the ability to pay has developed in the City of Casper. The problem of front-end financing of water supply projects in order to properly develop for future use at today's high costs presents a dilemma to Casper and every municipal and quasi-municipal entity in the State at this time.
6. Name of Person Completing this Application
   - Frank J. Trelease

STATE OF WYOMING

OFFICE OF THE STATE ENGINEER

APPLICATION FOR PERMIT TO APPROPRIATE SURFACE WATER

THIS SECTION IS NOT TO BE FILLED IN BY APPLICANT

Filing/Priority Date

THE STATE OF WYOMING } SS
STATE ENGINEER'S OFFICE }

This instrument was received and filed for record on the 10th day of February, A.D. 19 83 at 4:30 o'clock P. M.

MAYLAND ANDERSON, Assistant State Engineer

Recorded in Book ____ of Reservoirs, ____ on Page ____

Fee Paid $25.00 Map Filed P

WATER DIVISION NO 1 DISTRICT NO 15-5 Temp. Filing No 24 6/356

PERMIT NO ____ RESERVOIR

NAME OF FACILITY

THE Deer Creek RESERVOIR

1. Name(s), mailing address and phone no. of applicant(s): State of Wyoming - DEPAD
Barrett Building
Cheyenne, Wyoming 82002

2. Name & address of agent to receive correspondence and receive proofs: None

3. The use to which the water is to be applied is Irrigation, Recreation, Municipal, Industrial
(a) If more than one beneficial use is being applied for, the reservoir capacity must be allocated to each of the various uses.

Active Capacity	Inactive Capacity
See Remarks	

(b) The area of the high water line of the reservoir is 1027 acres.

(c) The total available capacity of the reservoir is 65785 acre-feet.

(d) If enlargement, the capacity of the enlargement is ____ acre-feet.

4. The source of the proposed appropriation is Deer Creek, tributary of the North Platte River

5. The center of the proposed reservoir is located N 70 degrees 50 min. E 1847.6 feet from the SW corner of Section 11 T. 31 N. R. 77 W. and is in the SW 1/4 SE 1/4 of Section 11 T. 31 N. R. 77 W

6. Are any of the lands covered by the proposed reservoir owned by the State or Federal Government? If so, describe lands and designate whether State or Federally owned.
State of Wyoming - Leased for grazing
U.S. Forest Service - Medicine Bow National Forest
U.S. Bureau of Land Management

7. Fill out either (a) or (b)
(a) The reservoir is located on the channel of Deer Creek
(b) The reservoir is to be filled through the ____
Canal which has a carrying capacity of ____ cubic feet per second

8. (a) The dam is to be constructed as follows: rockfill dam with impervious core
Contains 1,550,000 Cubic Yards.

(b) The water face of the dam is to be protected from wave action in the following manner:
rip-rap

Permit No. ____ Rev.

Page No. ____ (Leave Blank)

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8. The estimated time required for commencement of work is 3 yrs. ; for completion of Construction is 5 yrs.

10. The accompanying map is prepared in accordance with the State Engineer's Manual of Regulations and Instructions for filing applications and is hereby declared a part of this application. The State Engineer may require the filing of detailed construction plans.

Under penalties of perjury, I declare that I have examined this application and to the best of my knowledge and belief it is true, correct and complete.

Signature of Applicant or Agent — Date February 1, 1983

NOTE: If construction under this application is for enlargement of an existing reservoir, consent to this enlargement should be attached hereto from the present owners.

REMARKS

Reservoir Capacity Breakdown by Uses:

Municipal	19,700 AF
Irrigation	7,600 AF
Recreation & Dead Storage	5,300 AF
Industrial	30,485 AF
	65,785 AF

NOTICE

A Manual of Regulations and Instructions for filing applications will be furnished by the State Engineer's Office upon request. By carefully complying with the instructions contained in the Manual, much trouble and delay will be saved the applicant, the professional engineer or land surveyor, and the State Engineer's Office.

This application must be accompanied by maps in duplicate, prepared in accordance with the Manual and by a filing fee of twenty-five dollars ($25.00).

Applications returned for corrections must be resubmitted to the State Engineer within 90 days with the corrections properly made, otherwise the filing will be rejected.

This application, when approved, does not constitute a complete water right. It is your authority to begin construction work, which must be commenced within the time allowed in the permit.

Notice of commencement of work and completion of the work described in the permit, must be filed in the State Engineer's Office before the expiration of the time allowed in the permit.

If extensions of time beyond the time limits set forth in the permit are required, requests for same must be in writing, stating why the additional time is required, and must be received in the State Engineer's Office before the expiration of the time allowed in the permit.

To perfect your water right, your Water Division Superintendent, or his authorized representative, will measure you after you have submitted notice to the State Engineer stating you have completed the construction as described in your permit. After examination of the proof, it will be considered by the State Board of Control, and, if found to be satisfactory, the Board will issue to you a Certificate of Appropriation which will constitute a completed water right.

The granting of a permit does not constitute the granting of right-of-way. If any right-of-way is necessary in connection with the application, it should be understood that this responsibility is the applicant's.

Form 8 W 3
Rev. 4-68

LaVon Hewitt

No. 2. Do not fold this form. Use typewriter or print neatly with black ink.

STATE OF WYOMING

OFFICE OF THE STATE ENGINEER

Substitute/APPLICATION FOR PERMIT TO APPROPRIATE SURFACE WATER — T.F. No. 24 6/356

RECEIVED APR 15 '87

THIS SECTION IS NOT TO BE FILLED IN BY APPLICANT

Filing Priority Date

THE STATE OF WYOMING } ss
STATE ENGINEER'S OFFICE }

The original of this instrument was received and filed for record on the 10th day of February A D 19 83 at 4:30 o'clock P. M.

Frank J. Trelease
Frank J. Trelease, Asst. State Engineer

Recorded in Book (42 of Reservoirs on Page 51

Fee Paid $ 25.00 Map Filed X

WATER DIVISION NO 1 DISTRICT NO 15-5 Temp Filing No 24 6/356

PERMIT NO 9248 RESERVOIR

Substitute application received 4:25 M 2-10-83 A.M. F-22

NAME OF FACILITY

THE Deer Creek RESERVOIR

1 Name(s), mailing address and phone no. of applicant(s) is/are State of Wyoming, Water Development Commission, Herschler Building, Cheyenne, WY 82002 (307)777-7626
Note: Name of applicant changed due to Legislative changes in agency authorities and duties.
(If more than one applicant designate one as an agent for the others)

2 Name & address of agent to receive correspondence and notices Wyoming Water Development Commission, Herschler Bldg., 3rd Floor East, Cheyenne, WY 82002 (777-7626)

3 The use to which the water is to be applied is Municipal, recreation and fisheries, industrial, irrigatio
(a) If more than one beneficial use of water is applied for, the reservoir capacity must be allocated in acre feet to the various uses

Active Capacity	Inactive Capacity
65,216.42 acre-feet municipal, irrigation, industrial, recreation, and fisheries	568.58 acre-feet recreation and fisheries

(b) The area of the high water line of the reservoir is 1,917.37 acres
(c) The total available capacity of the reservoir is 65,785 acre feet
(d) If enlargement, the capacity of the enlargement is N/A - - - acre feet

4 The source of the proposed appropriation is Deer Creek, tributary of the North Platte River

5 The center of the proposed reservoir is located S 61° 18'52"W 8,232.70 feet distant from the NE corner of Section 12 T 31 N. R 77 W. and is in the NW¼SE¼ ¼ of Section 11 T 31 N. R 77 W

6 Are any of the lands covered by the proposed reservoir owned by the State or Federal Government? If so, describe lands and designate whether State or Federally owned
Federal Lands (BLM) NW¼ SE¼, SW¼ SE¼, Section 11, T31N, R77W
State Lands NW¼, Section 13, T31N, R77W, NE¼ NW¼, Section 25, T31N, R77W, SE¼ NE¼, Section 22, T31N, R77W

7 Fill out either (a) or (b)
(a) The reservoir is located in the channel of Deer Creek
(b) The reservoir is to be filled through the N/A - - - Canal which has a carrying capacity of N/A - - - cubic feet per second

8 (a) The dam is to be constructed as follows compacted rockfill embankment with an upstream reinforced concrete face-plane and specifications filed in State Engineer's Library under TC 530 .W8 D2 1984 Contains + 1,317,000 Cubic Yards
(b) The water face of the dam is to be preserved from wave action in the following manner
reinforced concrete face

Permit No 9248 Res Page No 51 (Leave Blank)

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9 The estimated time required for commencement of work is Spring 1987 for completion of Construction is Fall 1990

10 The accompanying map is prepared in accordance with the State Engineer's Manual of Regulations and Instructions for filing applications and is hereby declared a part of this application. The State Engineer may require the filing of detailed construction plans

Under penalties of perjury I declare that I have examined this application and to the best of my knowledge and belief it is true, correct and complete

Michael R. Powell

Signature of Applicant or Agent

Date 6/24/86

NOTE: If construction under this application is for enlargement of an existing reservoir, consent of the enlargement should be attached hereto from its present owners.

REMARKS

The primary purpose of the project is to supply municipal water to those Wyoming communities in the North Platte River drainage below Alcova Reservoir that demonstrate a need for water and wish to participate in the project; however, the use of stored water is not limited to municipal use.

After the initial filling of the reservoir, the project shall be operated in such a manner as to provide a minimum pool of twelve thousand four hundred (12,400) acre-feet unless the storage is required to meet municipal water demands. Initially, and until municipal demands reach their ultimate levels, some of the water could be made available on a temporary basis for other uses such as industrial supplies and supplemental irrigation water.

After initial filling of the reservoir, the project shall be operated in such a manner as to ensure the following monthly minimum bypasses and releases unless making these bypasses and releases will affect the project's capability to meet municipal demands:

January	10 cfs	July	15 cfs
February	10 cfs	August	15 cfs
March	10 cfs	September	15 cfs
April	15 cfs	October	10 cfs
May	15 cfs	November	10 cfs
June	15 cfs	December	10 cfs

NOTICE

A Manual of Regulations and Instructions for filing applications will be furnished by the State Engineer's Office upon request. By carefully complying with the instructions contained in the Manual, much trouble and delay will be saved by the applicant, the professional engineer or land surveyor and the State Engineer's Office.

The application must be accompanied by maps in duplicate prepared in accordance with the Manual and by a filing fee of twenty-five dollars ($25.00).

Applications returned for corrections must be resubmitted to the State Engineer within 90 days with the corrections properly made, otherwise the filing will be cancelled.

This application, when approved, does not constitute a complete water right. In most instances, it begins construction work which must be completed within the time allowed on the permit.

Notice of commencements of work and completion of the work described in the permit must be filed in the State Engineer's Office before the expiration of the time allowed on the permit.

If extensions of time beyond the time listed on face of the permit are required, requests for same must be in writing, stating why the additional time is requested, and must be received in the State Engineer's Office before the expiration of the time allowed on the permit.

No person owns water rights until Water Division Superintendent or his authorized representative will connect you after you have submitted notice to the State Engineer stating you have completed the construction as described in your permit. After connection of the ditch, it will be considered by the State Board of Control and if found to be satisfactory the Board will issue to you a Certificate of Appropriation which will constitute a completed water right.

The granting of a permit does not constitute the granting of a right of way. If any right of way is necessary in connection with the application it should be understood that the responsibility is the applicant's.

THE STATE OF WYOMING, STATE ENGINEER'S OFFICE } ss. SUBSTITUTE APPLICATION. ORIGINAL APPLICATION AND FIRST SUBSTITUTE APPLICATION FILED IN MISCELLANEOUS NOTICES UNDER THIS PERMIT.

THIS IS TO CERTIFY that I have examined the foregoing application and do hereby grant the same subject to the following limitations and conditions:

This permit grants only the right to use the water available in the stream after all prior rights are satisfied.

This permit is granted for municipal (Wyoming communities in the North Platte drainage that participate in the project - 65,216.42 acre-feet active) and fisheries and recreation (568.58 acre-feet inactive) purposes; however, some of the water could be used on a temporary basis for industrial and irrigation purposes.

After the initial filling, the reservoir will be operated to maintain a minimum pool of 12,400 acre-feet (568.58 acre-feet inactive capacity and 11,831.42 acre-feet active capacity) for recreation and fisheries purposes, unless the active contents portion may be needed for the municipal and temporary industrial and irrigation purposes.

After the initial filling, the reservoir will be operated to insure monthly bypasses and or releases of water at the dam during the water year of 10 cfs October through March and 15 cfs April through September to provide a minimum flow below the dam. Natural flow water bypassed to meet the demands of senior downstream water rights shall not be charged against the storage right; any water bypassed and not stored can be charged against the storage right in keeping with the one fill per year rule and practice. Water properly stored for fishery purposes can be released for minimum downstream flow purposes.

If the State Engineer determines at any point in time that the public safety so requires, water impounded in this facility shall be evacuated or maintained at any water level which may be required by the State Engineer. This condition is imposed in order to satisfy the requirements of Section 41-3-307 through 41-3-318, Wyoming Statutes.

The reservoir of this permit will inundate lands with water rights, creating a conflict in the records. The permittee has until 5 years from the date of completion of the reservoir to submit appropriate petitions to the State Board of Control to remove the conflicts from the record, or the State Board of Control will abandon the water rights.

The time for commencement of construction work shall terminate on December 31, 1988
The time for completing the construction of the reservoir shall terminate on December 31, 1990.

Witness my hand this 13th day of March A.D. 1987

George L. Christopulos

GEORGE L. CHRISTOPULOS,

Permit No. 9248 Res.

Page No. 51

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PERMIT NO 9248 RES

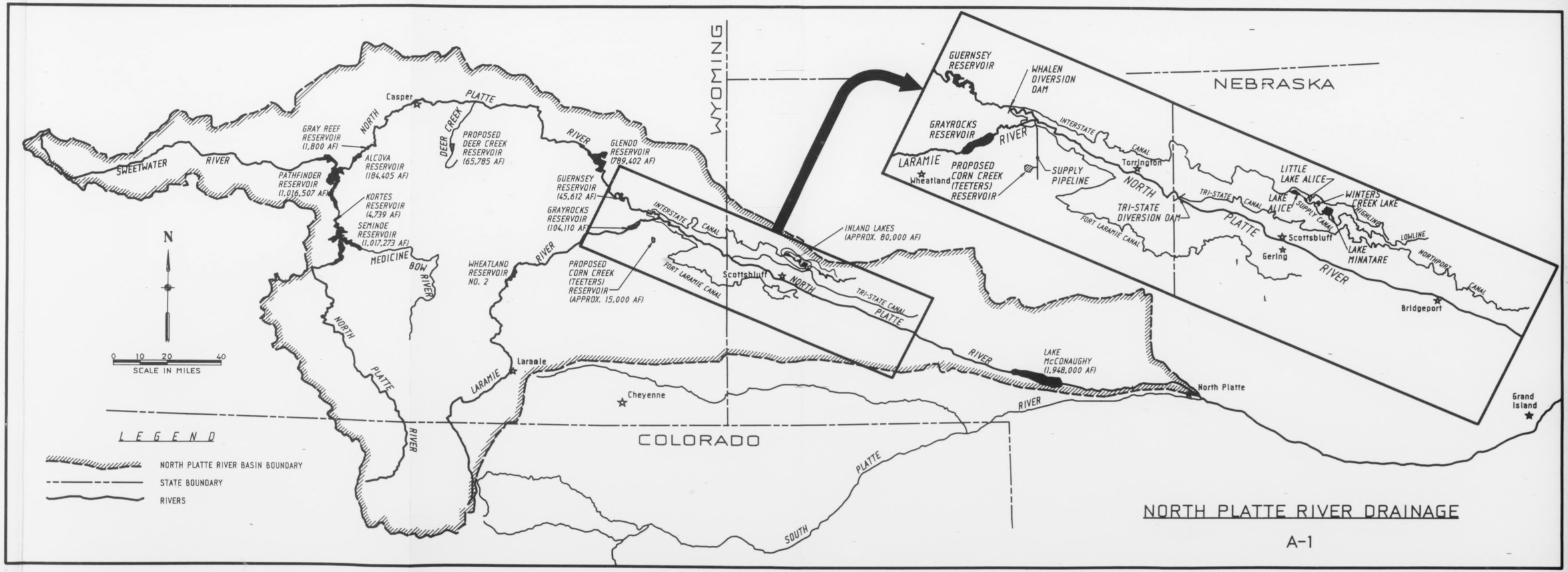
E-22

PERMIT STATUS

Application Date February 10, 1983 Approval Date March 13, 1987

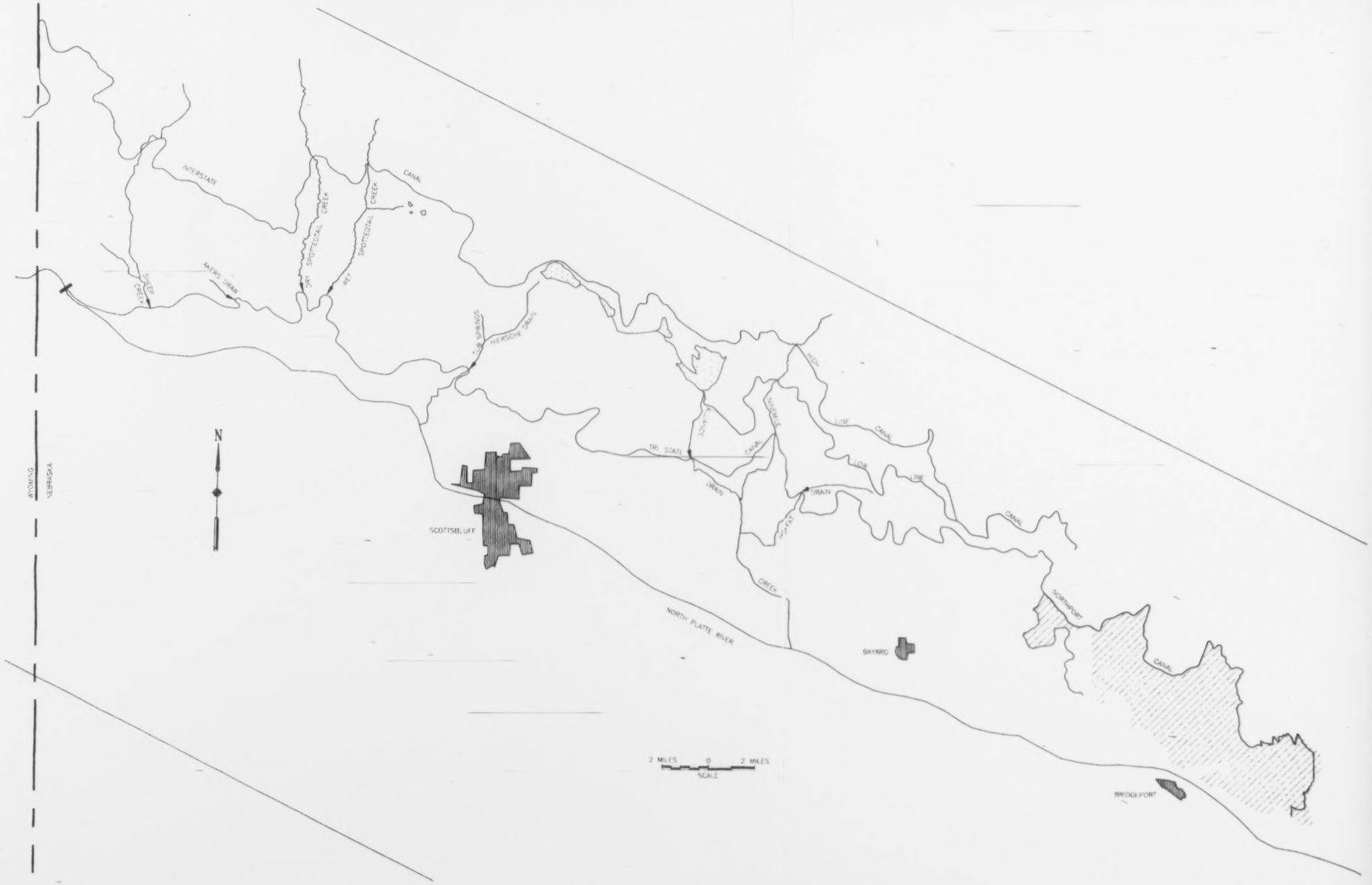
March 13, 1987 - Construction Plans approved for Deer Creek Dam. Thirty-one (31) reproducible plan sheets are filed in Construction Plans Safety of Dams File, Water Division No. 1, under Permit No. 9248 Res.

APR 1 : 87



NORTH PLATTE RIVER DRAINAGE

A-1


INTERSTATE
SPIKER CREEK
AKERS DRAIN
CAR SPOTTEDTAIL CREEK
KEY SPOTTEDTAIL CREEK
CANAL
TOM SPRINGS
HERSCHE DRAIN
WYOMING
NEBRASKA
N
SCOTTSBLUFF
TRI STATE CANAL
DRAIN
NORTH PLATTE RIVER
BAYARD
NORTHPORT CANAL
BRIDGEPORT
2 MILES 0 2 MILES
SCALE